Pre-Decisional Administrative Objection

RE: The Final Environmental Impact Statement for the Village at Wolf Creek Access Project and Draft Record of Decision

Introduction

This objection is submitted by Rocky Mountain Wild, San Luis Valley Ecosystem Council, San Juan Citizens Alliance, Defenders of Wildlife, Wilderness Workshop, Colorado Mountain Club, EcoFlight, Great Old Broads for Wilderness, and Rocky Mountain Recreation Initiative.

Objectors request that the Forest Service Reviewing Officer invalidate the Environmental Impact Statement and, if the project is to proceed, issue a new scoping notice to begin anew the National Environmental Policy Act Process based on consideration of the full project proposed by Levell-McCombs Joint Venture's (LMJV): construction of a resort city known as the Village at Wolf Creek at the top of Wolf Creek Pass. An independent reviewing officer must be carefully chosen to handle this matter, as LMJV and its agents have conducted extensive lobbying efforts over the past thirty years at all levels of the Forest Service and within the USDA, particularly previous leadership and staff within the office of the Under Secretary for Natural Resources and the Environment and current staff within the USDA Office of General Counsel.

The LMJV project is within the National Forest System on a federally encumbered inholding created "to allow for the development of the lands by the proponent for uses compatible to the existing Wolf Creek Ski Area." Draft ROD at 9. This Objection addresses issues raised by these organizations and their members, and in some instances, issues that have emerged through events occurring after the DEIS was issued or revealed through the limited subset of agency records released by the Forest Service in ongoing Freedom of Information Act (FOIA) requests. Objectors reserve the right to supplement these objections based on agency records unlawfully withheld by the Forest Service in pending FOIA requests.

The Wolf Creek Ski Area (WCSA) sits in the middle of a unique and important natural area of the National Forest System and next to the Wolf Creek Ski Area (WCSA). Although WCSA does have impacts to the Forest Service lands subject to a special use permit, the limited development associated with the developed recreational use allows the ski area to coexist with the wildlife, scenery, unique recreation, and important values of the area. An 1171-unit city of 10,000

people will upset the fragile balance the Forest Service has struck in managing the WCSA. In 1986, the Forest Service correctly concluded that transfer of public land with limited access to support a much smaller development was not in the public interest. The current project proposal, construction of a small city known as the Village at Wolf Creek that will require a grade-separated interchange to access U.S. Highway 160, does not serve the public interest in maintaining the status quo of the relatively undeveloped and natural character of the WCSA and surrounding National Forest.

These objections address the failure to comply with the National Environmental Policy Act (NEPA) purposes that are implemented by specific procedures designed to minimize and eliminate environmental impacts.

> The centerpiece of environmental regulation in the United States, NEPA requires federal agencies to pause before committing resources to a project and consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives. *See* 42 U.S.C. § 4331(b) (congressional declaration of national environmental policy).

N.M. ex rel. Richardson v. BLM, 565 F.3d 683, 703 (10th Cir. 2009). The real project here is LMJV's plan to construct and operate the proposed Village at Wolf Creek. The question of access to U.S. Highway 160 via federal land is a mere segment of the real project proposal.

The objections set forth the reasons the Final Environmental Impact Statement (FEIS) is deficient and why the Forest Service cannot adopt the Draft Record of Decision (DROD) that would grant access and other interest in federal lands to support construction of a project involving a small city of part time resort dwellings. Contrary to the LMJV-influenced NEPA document, the proposed project subject to NEPA analysis remains the same as it was in March 1986: "development of the lands by the proponent for uses compatible to the existing Wolf Creek Ski Area." Draft ROD at 9. The FEIS wrongly excludes the LMJV development from rigorous analysis, a legal error that narrows the scope of analysis and taints the entire NEPA process. Extensive and direct LMJV influence over the NEPA analysis has led to the repetition of the same issues that plagued the last NEPA analysis, with the same difficult questions being swept under the rug without full disclosure and consideration. *Colorado Wild, Inc. v. United States Forest Service*, 523 F. Supp. 2d 1213, (D. Colo. 2007).

By limiting the scope of issues and alternatives under the review, the FEIS presents the public and decision makers with a seemingly foregone conclusion on the land exchange proposal. Where the FEIS minimizes the true scope of federal control and authority over all aspects of the

Village at Wolf Creek, the public and relevant agency officials are presented with the false impression that the private developer can go forward with development without full NEPA analysis of the federally encumbered private lands. The attempt to manipulate the parcels and eliminate a federal nexus and NEPA review of the development via a land exchange is arbitrary, capricious, and contrary to law.

As set out below, and in the partial record the Forest Service has disclosed to Objectors, NEPA requires that the Forest Service begin anew by conducting scoping on a new EIS that analyzes the entire development proposal, alternatives, impacts, and mitigation measures in a single EIS. NEPA requires that an EIS must be prepared before committing resources to the LMJV proposal in the form of expanded access, easements, and approvals that ignore and sometimes eliminate important and valuable federal interests in the private lands.

1. The Purpose and Need and Designation of the NEPA "Federal Action" are Invalid

Objectors raised this issue in their DEIS Comments, dated October 11, 2012, on pages 2 - 4. The FEIS is based on the legally erroneous determination that the "Purpose and Need for Action is to allow the non-Federal party to access its property as legally entitled. The Proposed Action is a land exchange, not a village." FEIS Appendix I at 142. However, the federal control of the development is confirmed by the March 6, 1986 Decision Notice, which stated:

> The land exchange proponent must donate an easement over the Federal tract to the United States which provides a specific level of control of the type of developments on the Federal land conveyed. The purpose of the easement will be to assure that development of the Federal land conveyed is compatible with the Wolf Creek Ski Area.

Exh. 1 at 4, see also Exh. 2 (imposing "one additional mitigation requirement").[1] Whatever LMJV's legal entitlement, there is no question that federal control over the development of parcel conveyed to LMJV exists and was contemplated from the inception of the project proposal.

Contrary to the "Proposed Action is […] not a village" determination, the FEIS and administrative record reveal that the proposed "major federal action" is the proposed construction and operation of a resort city known as the Village at Wolf Creek to house 10,000 people for the purpose of skiing at the WCSA and recreating on the surrounding National Forest

[1] Exhibits will be sent via email and standard mail to ensure receipt.

system lands. The so-called Village is the proposed "major federal action" that triggers the agency's statutory duty (42 U.S.C. § 4332(2)(C)) to use NEPA's procedural requirements to "prevent or eliminate damage" to the environment. *Ross v. FHA*, 162 F.3d 1046, 1051 (10th Cir. 1998)("major federal action" means that the federal government has "actual power" to control the project). The NEPA process must "analyze not only the direct impacts of a proposed action, but also the indirect and cumulative impacts of 'past, present, and reasonable foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.'" *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1035 (10th Cir. 2001)(emphasis supplied). Once a "federal action" triggers the NEPA process, an agency cannot, define "the project's purpose in terms so unreasonably narrow as to make the [NEPA analysis] 'a foreordained formality.'" *City of Bridgeton v. FAA*, 212 F.3d 448, 458 (8th Cir. 2000)(quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991), cert. denied 502 U.S. 994 (1991) citing *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 666 (7th Cir. 1997)). By limiting analysis of direct impacts of the "federal action" to the effects of the land exchange and ANILCA access, the FEIS violates NEPA. By narrowly defining the action to eliminate the true purpose of the land exchange – construction and operation of the Village at Wolf Creek to service the WCSA users, the FEIS unlawfully avoids a hard look at the direct impacts of the LMJV development and instead confirms that "the range of development concepts is simply included to provide an estimate of potential indirect effects." FEIS at 1-4.

In reaching its erroneous legal conclusion, the Forest Service ignored and downplayed the full scope of federal power and control over the proposed LMJV development project. Narrowing the "major federal action" to a mere access proposal narrowed the purpose and need and segmented the scope of analysis of the NEPA process to the limited question of how to provide additional access to the federally encumbered parcel created by the 1987 land exchange. DROD at 2, FEIS at 1-3. The DROD explicitly states that "future residential development is not a component of either of the Action Alternatives analyzed in the FEIS." DROD at 22. Instead of detailed analysis of the direct impacts and current federal options based on existing federal control over the entire project, the NEPA analysis of the development proposal is limited to indirect impacts derived from an incomplete "conceptual" development plan. FEIS at 1-4, 2-6

The FEIS cannot withstand scrutiny where NEPA prohibits the agency from delaying the NEPA analysis of the direct impacts of reasonably foreseeable development for detailed examination until after access is granted and the federal power over the private parcel has been limited, but not eliminated, by the proposed DROD. Although Defendants' assurances of future NEPA review possess a certain pragmatic appeal, such assurances cannot obviate the need for compliance with NEPA regulations. Sierra Club v. United States DOE, 255 F. Supp. 2d 1177, 1186

(D. Colo. 2002)(holding issuance of easements for mine access arbitrary and capricious when it preceded NEPA compliance of the full mining project).

The stated purpose and need ignores the fact that the increased access is primarily, if not exclusively, intended for building a development with up to 1711 units (FEIS at 2-7) at the base of the Wolf Creek Ski Area to provide housing for National Forest users. Even the title of the project - Village at Wolf Creek Access Project – confirms that analysis of providing access has been segmented to exclude analysis of the direct impacts of the full development proposal. Based on review of the record, it appears that the Forest Service has again deliberately structured its NEPA disclosure and analysis of access options in order to diminish federal control over the federally encumbered parcel, to the detriment of the National Forest System. The history of this project suggests this unlawful segmentation and narrow purpose and need is the product of internal Forest Service bias created by political pressure applied by the project proponent.

As a result of the unreasonably narrow purpose and need, the FEIS is limited to analyzing the direct impacts of two action alternatives: a land exchange that moves the private parcel adjacent to U.S. Hwy 160; and, an expanded road easement based on the false premise that ANILCA requires the Forest Service provide whatever access a private landowner demands. By narrowing the purpose and need in this manner, the reasonable alternative of conditioned federal approval of a limited development based on existing access was unlawfully eliminated from the NEPA process. Using existing and potential federal encumbrances on the private parcel were excluded by the narrowed purpose and need, resulting in the failure to disclose alternative project designs and mitigation measures. Instead, the narrowed scope of the FEIS is based on the factually erroneous assertion that the "Rio Grande NF has no jurisdiction on private lands." FEIS at 1-29. Where LMJV received these public lands heavily encumbered by federal easements and the Forest Service has authority to further encumber any expanded access granted under ANILCA or the land exchange, the Forest Service has ample control and jurisdiction over the LMJV development project. *Sierra Club v. United States DOE*, 255 F. Supp. 2d 1177, 1186 (D. Colo. 2002)(holding issuance of easements for mine access arbitrary and capricious when it preceded NEPA compliance of the full mining project).

The possibility of altered and new easements to replace the existing special use permits were excluded from the purpose and need. The resulting narrowed scope of analysis treats the federal grant of additional easements necessary for construction and operation of the LMJV project as a foregone conclusion. The additional easements that were ignored include:

- "[T]he Village Ditch Infiltration Gallery would be located on NFS land." Appendix at 87

- The Forest Service plans to grant "Reservations/Easements at the time of the exchange for construction and operation of a raw water pipeline [over National Forest] to the private property."; FEIS at 4-40. "[T]he easement for the raw water pipeline [would run] from the infiltration gallery across an undeveloped [National Forest] landscape to FSR 391, and then proceed northeast along this road to the private land parcel"). Appendix at 5.
- "[W]hen the exchange is completed the Rio Grande NF would grant an easement for a ski area access road." FEIS at 4-88
- "Following the land exchange, the Proponent would convey lands within the [Colorado Department of Transportation] CDOT easement (ROW) to CDOT as a part of the Village permitting process with Mineral County." FEIS Appendix 11 at 157. CDOT harshly criticized the NEPA segmentation of these and other foreseeable actions that would affect U.S. Highway 160. FEIS Appendix at 206-211.
- "Hazardous materials (benzene plume) are known to affect the [federal] parcel; however, the potentially responsible party [PRP] has been identified and the parcel will be conveyed with indemnification language in the patent. " Exh. 3 (9/15/2014 Appraisal Review Proposed Village at Wolf Creek Land Exchange) at 7. The PRP's identity and Superfund ownership liability that cannot be eliminate by indemnification, was not disclosed in the FEIS or the Appraisals.

As recognized later in the FEIS, the proposed easements and use of federal lands to support the LMJV proposal "represent a direct impact." FEIS at 4-91. However, because the new easements and use of federal lands were excluded from the purpose and need, the direct impact of these actions escaped detailed review across a range of potential alternatives and mitigation measures that could lessen or eliminate the impacts of the proposed development. Examination of the federal interests in both properties confirms the Forest Service power and control over the private parcel by virtue of the existing easements and proposed new easements. Because the special use permits for these and other private use of federal lands are not transferrable, the Forest Service swept this issues under the rug by giving the appraiser the "instruction to consider special use authorizations as if replacement easements were in place." Exh. 4 (2014_updated_appraisal_review-signed – *September 15, 2014, Technical Appraisal Review Report*) at 12.

By erroneously excluding the plan to alter existing permits and encumbrances from the purpose and need, the decision maker and the public are presented with a narrowed range of alternatives and the FEIS excludes the "hard look" NEPA requires for the existing and potential easements the Forest Service plans to alter and issue. The instructions contained in appraisal review confirms that the Forest Service intentionally and knowingly created a package deal of

easements necessary for construction and operation of the LMJV project as a foregone conclusion, outside the NEPA analysis. See FEIS Appendix 11 at 87.

The response to comments also reveals legal error by the Forest Service in defining the scope of the NEPA analysis.

> It should be noted that the Forest Service does not regulate development on private property. Therefore, utility issues for any development resulting from Forest Service approval of either of the Action Alternatives would be addressed during the Mineral County PUD process.
>
> In summary, all utilities for the two Action Alternatives would either be located on private land or within Forest Service reservations/easements. There is no connected action that would require an environmental analysis. […]
>
> It is beyond the scope of this FEIS to address safety concerns with hanging utilities from bridges, because the purpose of the FEIS is to evaluate access options to the private land inholding.

Id. at 87-88. Proposed and existing easements encumbering both parcels provide actual federal control that triggers direct NEPA analysis of the potential use and alteration of the federal authotiry. *San Luis Valley Ecosystem Council v. U.S. Fish and Wildlife Service*, 657 F.Supp.2d 1233 (D.Colo. 2009); *Sierra Club v. United States Dep't of Energy*, 255 F.Supp.2d 1177 (D.Colo. 2002); *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 933-34 (Colo.1997)(express and implied easements involve federal power over private use of the federally encumbered private property interest). By narrowing the purpose and need to exclude the alteration and enforcement from NEPA review is arbitrary and capricious. Even if the easements were not part of the federal action, the easements necessary to carry out and/or limit for development have been recognized by the other federal agencies as federal actions requiring the NEPA "hard look" and disclosure of direct impacts, alternatives, and mitigation measures. See e.g. FEIS App. at 197 (DEIS EPA comments requesting analysis of utility and other easements), Id. at 199 (EPA comment – without analysis of restrictions "not possible to determine the full impacts of the land exchange"), FEIS App. at 206 - 211 (CDOT comment – "that the [DEIS] lacks adequate detail for the full build-out alternatives to allow us to provide meaningful traffic, safety, and access-related comments."), FEIS App. at 213 CDP comments on utility easements).

The incomplete administrative record confirms the scheme to eliminate full analysis of the Forest Service control over the LMJV project. Utility and other access easements were discussed and confirmed at a meeting between LMJV, Forest Service and NEPA contractors, as recorded by Rick Thompson, a private wildlife consultant with a long history with the LMJV project. Exh. 5 (78763_FSPLT3_2392794) (recording July 21, 2011 "determinations with respect to NEPA and (ESA) section 7 laws"). The results of the July 21, 2011 determinations directed the FEIS preparers to forego detailed analysis by arbitrarily defining everything except the roads as "indirect impacts." Id. The built-in bias confirmed by Mr. Thompson's meeting notes continues a pattern of the Forest Service tolerance of deliberate decisions to manipulate the NEPA process by narrowing the purpose and need and thereby converting "direct impacts" to "indirect impacts" that receive less NEPA and Endangered Species Act scrutiny. Colorado Wild Inc. v. United States Forest Service, 523 F.Supp.2d 1213, 1230 (D.Colo. 2007)(Forest Service "failed to collect and to investigate these communications and include them in the administrative record so it and the public could assess whether the LMJV-Tetra Tech relationship had violated the integrity of the NEPA and decision-making process.") Colo. Wild, Inc. v. U.S. Forest Serv., No. 06-cv-02089, 2007 WL 3256662 (D. Colo. Nov. 1, 2007)(discussing violations of NEPA contractor MOU and destruction of relevant administrative records).

Similarly, the purpose and need also ignores the fact that the federal government originally retained important property interests in the private parcel traded to private interests in 1987. The retained federal control over the private parcel includes approval of any development per the Scenic Easement, which allows the Forest Service to impose terms and conditions "minimizing environmental effects to natural resources within the project area." DROD at 2, FEIS at 1-3. The alternative means to exercise this easement provides federal control and influence over the LMJC proposal for the benefit of the National Forest System and WCSA that was not analyzed in the FEIS.

Instead, without the benefit of NEPA analysis, the DROD proposes to relinquish the federal interests in the parcel instead of using them to achieve the purpose of minimizing and eliminating environmental impacts of the Village proposal. Although the Forest Service's NEPA lead (Tom Malecek) recognized that <u>"the scenic easement was applied to the ariginal (sic) excahnge (sic) for a reason,"</u> the FEIS does not disclose or discuss these reasons or the reasonable alternatives involved with asserting direct federal control and authority over the development proposal, as contemplated by the Scenic Easement. Exh. 6 (78763_FSPLT3_2392740) (emphasis supplied).

The capricious narrowing of the "major federal action" and "purpose and need" thwarts the purpose of the NEPA process, which influences the decision making process "by focusing the

[federal]agency's attention on the environmental consequences of a proposed project," so as to "ensure[] that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson v. Methow Valley Citizens Counci*l, 490 U.S. 332, 349 (1989). The proposed project remains the same as it was in March 1986: "to allow for the development of the lands by the proponent for uses compatible to the existing Wolf Creek Ski Area." Draft ROD at 9. Although the previous Forest Service review and approvals have been unlawfully segmented over a number of decades, the current proposal to build a 1711 unit city on this federally encumbered private inholding is the project that defines the purpose and need, and therefore defines the scope of the NEPA analysis and comparison of alternatives.

A narrowly drawn purpose and need poisons the entire NEPA process on which the unlawful purpose and need is based. As Senior Judge Kane confirmed when enjoining the previous attempt to approve the Village at Wolf Creek:

> In deciding whether an agency has adequately identified and considered all reasonable alternatives, "courts look closely at the objectives identified in an EIS's purpose and needs statement." Fuel Safe, 389 F.3d at 1323 (quoting Citizen's Comm. to Save Our Canyons v. U.S. Forest Serv., 297 F.3d 1012, 1031 (10th Cir. 2002)). "Where the action subject to NEPA review is triggered by a proposal or application from a private party, it is appropriate for the agency to give substantial weight to the goals and objectives of that private actor." Citizens' Comm., 297 F.3d at 1030. Nevertheless, an agency may not "define a project so narrowly that it forecloses a reasonable consideration of alternatives." Fuel Safe, 389 F.3d at 324 (quoting Davis, 302 F.3d at 1119); Citizens' Comm., 297 F.3d at 1030.

Colorado Wild, Inc. v. United States Forest Service, 523 F. Supp. 2d 1213, 1226 (D. Colo. 2007). The 2014 FEIS purpose and need is so narrowly drawn that it forecloses consideration of reasonable alternatives, such as using acquisition/purchase or exerting federal control to limit the development proposal to several single-family units on 35 acre parcels under existing seasonal access. The purpose and need asserted in the FEIS continues to rest on the false premise asserted by the LMJV, and rejected by the court, that there is an automatic duty to provide additional access upon request beyond what was granted in the 1986 land exchange. As confirmed by the appraisals, the current "highest and best use" of the public land obtained by the 1987 land exchange is development of a set of small, dispersed units based on access conveyed pursuant to the 1987 land exchange. See Exh. 7 (*Supplemental Report to the Appraisal of Real Property, for the Non-Federal Parcel, dated September 1, 2014*) at p. 12, and

Exh. 7a (*Supplemental Report to the Appraisal of Real Property, for the Federal Parcel, dated September 1, 2014)*.

Moreover, whatever rights are considered reasonable access alternatives under ANILCA, any such access involves considerable agency control and authority in imposing "terms and conditions" on the ANILCA access and its subsequent use. In addition, the agency may impose "reservations and restrictions" …. "as are needed to protect the public interest…or otherwise,… as appropriate". See 36 CFR 254.3(h). The proposed use of the expanded access proposal is full build out of the 1711 unit LMJV project, over which the Forest Service maintains considerable control and authority. The current purpose and need limits the scope of analysis and again ignore LMJV's assertion during the past litigation that "it could and would build and operate the Village as planned using FSR 391 if needed, without the additional access and utility corridors it requested." See *Colorado Wild, Inc. v. United States Forest Service*, 523 F. Supp. 2d 1213, 1216 (D. Colo. 2007).

The purpose and need of providing additional access as a matter of LMJV entitlement continues to rest on the Forest Service's legally erroneous premise regarding federal control and authority pressed by LMJV's interpretation of ANILCA, and rejected by Senior Judge Kane:

> The Forest Service's determinations regarding "reasonable use and enjoyment" and access adequate for such use under ANILCA § 1323(a) are not, as LMJV asserts, a matter of the Forest Service rubber-stamping whatever use the landowner announces it intends to make of its property and then providing access adequate to meet this purpose. ANILCA § 1323(a) only requires the Forest Service to provide access "that the Secretary deems adequate for the reasonable use and enjoyment" of the property, "subject to such terms and conditions as the Secretary of Agriculture may prescribe." 16 U.S.C. § 3210(a). By the statute's terms, therefore, the Secretary must determine what constitutes reasonable use and enjoyment of the lands, what access is adequate to allow for those reasonable uses and what, if any, terms and conditions should be placed on that access to meet other statutory and regulatory obligations and goals. *See id.; High Country Citizens' Alliance v. United States Forest Service*, 203 F.3d 835 (10th Cir. 2000) (unpublished). Forest Service regulations governing ANILCA access requests reiterate these statutory requirements. *See* 36 C.F.R. § 251.114(a) (requiring agency to determine what constitutes reasonable use and enjoyment of non-Federal lands and to authorize only the access needed for such use and enjoyment and "that minimize[s] the impacts on the Federal resources"); *see also* Final

> Rule, 56 Fed. Reg. 27410, 27410 (June 14, 1991) (ANILCA access determination "is a discretionary decision of the authorized officer based upon given circumstances"). The Forest Service has also acknowledged that ANILCA, while not authorizing direct control or use of non-Federal land, does "provide[] a basis for determining the appropriate private access use of Federally owned land," 56 Fed. Reg. at 27411, and "does not require the authorized officer to allow the construction of [an access] facility on Federal land that would be required for a use on the non-Federal land that the authorized officer considers to be an unreasonable use of the non-Federal land," id. at 27410. Thus, the Forest Service has stated, its reasonable use determination under ANILCA may properly limit a landowner's use of non-Federal land "to the extent that the facilities and modes of access authorized on Federal land limit the use and enjoyment of non-Federal land to that which is determined to be reasonable by the authorizing officer." Id. at 27412.

Colorado Wild, Inc. v. United States Forest Service, 523 F. Supp. 2d 1213, 1227 FN15 (D. Colo. 2007) (emphasis supplied). Even though ANILCA, combined with easements and other federal encumbrances on the LMJV property, provide considerable agency authority and control to limit and place conditions on the access and the development proposal itself, this federal authority is repeatedly downplayed and even dismissed in the FEIS. See e. g., FEIS section 2.4, p. 2-6. Where the Forest Service continues to withhold records requested under FOIA and has posted an incomplete Administrative Record to its project website, it is reasonable to infer that the LMJV and project supporters within the agency have again lobbied the 3rd Party NEPA consultant to downplay and ignore the federal discretion involved it the project proposal. See Colo. Wild, Inc. v. U.S. Forest Serv., No. 06-cv-02089, 2007 WL 3256662 (D. Colo. Nov. 1, 2007)(confirming violations of MOU and destruction of documents), Exh. 8 (78763_FSPLT3_2393064) (8/20/2013 email regarding Tom Malecek deletion of project records).

As discussed below, the inference of bias and influence on the purpose and need in the 2014 FEIS is based on the Forest Service and the private NEPA contractors being lobbied by Adam Poe and other agents of the project proponents. At the scoping stage, when purpose and need was being developed, Forest Service personnel were conveying the proponent's threat to influence the purpose and need via emails saying, for example, that if the proponents' requests were not honored, "Poe tells me that Red McCombs will pull the proposal and set the access application back in front of you." Exh. 9 (78763_FSPLT3_2392571). These veiled threats occurred in July 2011, at the same time that LMJV sought to influence the analysis via direct meetings with the NEPA preparers and by lobbying the Undersecretary. Although the Forest

Service has not released relevant Washington Office documents requested by the pending November 2013 FOIA request and the February 2014 FOIA request currently being litigated, previous NEPA analysis was tainted by direct intervention and by then Undersecretary Mark Rey on behalf of LMJV.

An unbiased analysis would reveal a true NEPA purpose and need requiring disclosure and a NEPA "hard look" at the direct impacts of the Village proposal in light of the significant control and authority contained in federal property interests and statutory provisions applicable to the LMJV proposal. Even the LMJV's publicly distributed material characterizes its narrow perspective on the purpose and need to include building the full development.

> The decision on the exchange boils down to whether it is preferable from the public's perspective for us to build on the land we presently own or whether it is better for us to build on the land further away from the Ski Area and wetlands.

Exh. 10 (*project proponent website*). As LMJV inadvertently confirms, building the Village at Wolf Creek is the real project proposal, with the exchange proposal being segmented component of the "Federal Agency Action." While LMJV's website advertises its intent to start construction without delay, a conceptual development is used for the NEPA analysis.

It is important to note, but ignored by the FEIS, that the 1987 land exchange was initially judged by the Forest Service as "not in the public interest." See Exh. 11 (February 20, 1986 Decision Notice) at 3. Through intervention of Senators and House members, that decision was reversed and the exchange went forward. Exhs. 12-13 (Letters). Based on ongoing discussions with individual Forest Service staff and review of agency records obtained through Freedom of Information Act requests and associated litigation, it appears that most Forest Service personnel continue to view land exchange as contrary to the public interest.

On remand, an appropriate purpose and need must include options to reverse the mistake made in 1986 due to political influence, including an alternative that returns the island of private lands to the National Forest System. Defining a lawful "federal agency action" and "purpose and need" will require extraordinary measures to guard against continued pressure exerted by and on behalf of LMJV for the Forest service to ignore the statutes and federal encumbrances on the parcel. In sum, a new NEPA process is needed to remedy legal errors and the narrowly drawn purposes and need that prevent the FEIS from disclosing and analyzing the existing encumbrances and reasonable alternative means for the Forest Service to protect the National Forest System and WCSA from the LMJV project proposal. In the words of one of the

project leaders, "the scenic easement was applied to the ariginal (sic) excahnge (sic) for a reason." Exh. 6 (78763_FSPLT3_2392740). The reasons for retaining federal control over the LMJV parcel and the NEPA disclosure and analysis of available federal power and control over the LMJV project lies at the heart of a new NEPA analysis.

2. The DEIS Perpetuates the Same Structural Flaws Addressed by the Previous Injunction and Settlement

Objectors discussed this issue on pp. 4-6 of our DEIS comments.

Instead of conforming its NEPA and other land management duties to the results of the previous litigation, it appears that LMJV and the Forest Service have again conspired to avoid and diminish federal control over this parcel.

Many of the same biases and deficiencies that were presumably resolved in the previous NEPA analysis and litigation in 2007 have reemerged and are addressed in this objection. This inference is based on available materials and the incomplete administrative record posted on the project website, and in light of the pattern of violating objectors' FOIA rights of timely access to relevant agency records. Available records and the FOIA violations create the reasonable inference that many of the same Forest Service line officers and attorneys in the Office of General Counsel and Undersecretary's Office continued to work closely with the developer to derail the 2014 NEPA process and limit disclosure of the true extent of federal control over the federally encumbered parcel and project proposal.

Because the NEPA and FOIA violations appear to form an interrelated pattern and practice of Forest Service violation of federal law regarding LMJV proposal, the Administrative Record and filings from the previous litigation are included in four DVDs sent with this objection. The full record submitted to the Colorado Federal District Court is incorporated by reference as evidence demonstrating a pattern and practice of ignoring federal laws and federal property interests that provide extensive federal control over development and use of the LMJV parcel.

The relevance of these records to confirm continued bias and undue influence is established by the incomplete record made available to Objectors. For example, NEPA preparers attempting to conceal problems with the scope of analysis as applied to the Lynx analysis engaged in a process of exchanging "hardcopy so it would not be subject to FOIA. " Exh. 14 (*FW_ WCV FP Amendment Question Revisited)*. Rick Thompson, a key contractor involved in Tetra Tech's preparation of the invalidated 2006 EIS, played a key role in achieving LMJV's goals of a limited

scope analysis that redefined the direct project impacts into “indirect impacts” that receive less detailed analysis. Exh. 15 (78763_FSPLT3_2392794).

A continuing problem and similarity is the failure to keep and maintain an accurate Administrative Record. In order to meet the federal agency decision making and recordkeeping requirements, a contemporaneous administrative record must be kept and maintained in a manner that allows public and judicial review of the agency actions. The Federal Record Act imposes a duty to “make and preserve records” to document agency decision making. 44 U.S.C. § 3101 ("The head of each Federal agency shall make and preserve records containing adequate and proper documentation of the [. . .] decisions [. . .] of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency’s activities."). The Federal Records Act’s “clear purpose is to ensure that agencies make adequate records documenting its operations. It also mandates, quite naturally, that the agencies then retain those records (else making them would be of little consequence).” *Rohrbough v. Harris*, 549 F.3d 1313, 1319 (10th Cir. Colo. 2008)(explaining substantive and procedural duties under the Federal Records Act)(parenthetical in original). For agency decisions subject to the Administrative Procedure Act, The complete administrative record consists of all documents and materials “directly or indirectly considered by the relevant agency decision makers.” *Ctr. for Native Ecosystems v. Salazar*, 711 F. Supp. 2d 1267, 1275 (D. Colo. 2010) (citing *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993)).

The federal recordkeeping mandate was recognized early in the current NEPA process where the employment contract between the project proponent’s agent and the Third-Party NEPA Contractor (WER) required ongoing maintenance of a master index of all documents that would constitute the Administrative Record .

> ix. As of the date of this contract, WER and its subcontractors will document all of their work, including any sampling, testing, field observations, literature searches, analyses, recommendations, letters, e-mails and other work that supports the EIS. WER shall maintain a master index of all documents it receives or generates that are directly or indirectly considered in the decision making process or that demonstrate compliance with laws, regulations or policies. The index will show at a minimum the date, author, addressee, source document, document number and page number, and subject matter of the document. WER and any subcontractors shall also document all the Forest Service records in a similar and compatible manner. The index shall be an appendix to the EIS and used to incorporate by reference the items listed

> in the index to the EIS. The index shall be updated throughout the preparation of the EIS. These documents and index will form the basis of the Administrative Record compiled and designated by the Forest Service. The term "document" as used in this paragraph includes data of any sort, including but not limited to electronic media; planning data; maps; files; reports; e-mails; computer, audio or video tapes and disks; and other records.
>
> x. All documentation will be maintained in a system pursuant to Forest Service direction as specified in IV Subsection B. ix of the MOU.

Exh. 16 – (78763_FSPLT3_2392464).

However, the statutory mandates and MOU were not followed. No such index was included as an appendix to the FEIS. No such index was posted on the website where the Forest Service placed an incomplete set of records that purported to constitute an administrative record. Exh. 17 (pdf screenshot of Project website, December 1, 2014). No such index was provided in any of the as-yet incomplete FOIA responses. It is reasonable to infer that an Administrative Record was not kept or maintained for the FEIS or the Draft ROD. Based on the pattern of document withholding and destruction involving Forest Service NEPA contractors, *post hoc* recreation of an administrative record is likely futile.

Where required procedures were ignored in making the Administrative Record and the Forest Service has not released an index or otherwise made a full Administrative Record available to objectors or the public, the FEIS should be invalidated. Colorado Wild Inc. v. United States Forest Service, 523 F.Supp.2d 1213, 1230 (D.Colo. 2007)(Forest Service "failed to collect and to investigate these communications and include them in the administrative record so it and the public could assess whether the LMJV-Tetra Tech relationship had violated the integrity of the NEPA and decision-making process.").

The FEIS is based on similar bias and undue influence that corrupted and eventually invalidated the previous NEPA analysis and should be invalidated on that basis alone. Because the Forest Service has reverted to the lack of transparency and a pattern of limiting the NEPA scope of analysis, violating record retention duties, and violating public FOIA rights that characterized the previous analysis, objectors reserve the right to supplement their objection with additional materials, agency records and additional arguments once the pending and overdue FOIA requests are fulfilled.

3. The Range of Alternatives Considered is Inappropriately Narrow

This issue was raised in Objectors' comments at page 6. 40 CFR 1502.14(a) states that the agency must "Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." The benchmark for examination of the range of possible alternatives is that the Forest Service must take a *hard look* at possible alternatives. This is especially true for any alternative uncovered during the scoping process that appears to be legal, is consistent with policy objectives, has broad public support, and is reasonably feasible. It is "arbitrary and capricious" where an agency "limited the scope of the analysis" to avoid analysis of "the full scope of the proposed […] project. San Luis Valley Ecosystem Council v. U.S. Fish and Wildlife Service, 657 F.Supp.2d 1233, 1237 (D.Colo. 2009) (granting preliminary injunction based on agency "eliminating any alternative […] sites or methods") discussing Colorado Wild, 523 F.Supp.2d at 1226.

a. Examination of Acquisition Alternative was Unlawfully Excluded

In Section 2.3.2 of the FEIS, the Forest Service discusses fee purchase as an alternative that was considered but eliminated from detailed analysis. The reasons given for rejection of the alternative are that it does not meet the Purpose and Need, and that funding is "not likely" to be available. However, as described above, the purpose and need in this case have been misidentified. The Forest Service's contention that funding is "not likely" is arbitrary. Thus the Forest Service failed to take a hard look at a viable alternative.

In a similar situation in the 1990s, the Arapaho Roosevelt National Forest (ARNF) contended that funding was not available for purchase of property owned by the City of Golden (known as Beaver Brook Watershed) which was adjacent to ARNF land. Like Alberta Park (the proposed location for the Village at Wolf Creek), the Beaver Brook Watershed serves as an important connection for wildlife habitat, and its development would have had significant direct and indirect effects on wildlife and water quality. Under public pressure, the ARNF eventually signaled that it would consider fee purchase if funding were available. By taking this stance, ARNF created an atmosphere where 1) the public had reason to participate in fundraising, 2) government officials had reason to seek funding through the Land and Water Conservation Fund and private sources, and 3) the seller realized that the government may be a willing and capable buyer. Eventually, this led to successful conservation purchase of the parcel through a

cooperative effort using private and public funding sources[2]. In the Wolf Creek Access case, the Rio Grande National Forest could facilitate outright purchase of the private lands at Wolf Creek by similarly indicating interest in doing so. The first step would be to add a fee purchase alternative to the DEIS.

The agency cannot summarily dismiss a viable alternative proposed by the public even if implementation would be difficult or outside of the agency's normal jurisdiction[3]. Even though the Forest Service would need to use funding from Congress, the public, and/or another source, it cannot dismiss the fee purchase possibility on the grounds that the funding necessary to entice a willing sale is outside of the Forest Service's jurisdiction. FEIS at 2-5. Whether or not LMJV is open to the concept of federal acquisition is irrelevant to the analysis of the beneficial effects of returning the entire LMJV parcel to the National Forest System. The Forest Service should fully analyze the fee purchase scenario with a willing-seller assumption so that the public and government officials could compare this with the other alternatives. Outright purchase would be more consistent with the existing Forest Plan than any of the three existing alternatives. As with any transaction, whether it is a federally encumbered private parcel or used cars, the willingness of the seller and potential public buyer is tied to a realistic assessment of the encumbered private interest and the terms of the potential offer. The FEIS fails to provide an accurate assessment of the acquisition alternative due to the biased purpose and need.

b. Construction and Operation Limited to Existing access was not analyzed.

The appraisals confirm that one homesite per each 35 acre parcel is the currently allowed Highest and Best Use of the LMVJ parcel based on existing access. Although 35 acre development was include as a development concept with some analysis of indirect effects, NEPA requires that the direct impacts of viable alternatives be disclosed and compared. 40 C.F.R. § 1502.14(a). The requirement that agencies consider alternatives to the action under review is "the heart of the environmental impact statement." Fuel Safe Washington v. Fed. Energy Regulatory Comm'n, 389 F.3d 1313, 1323 (10th Cir.2004) (quoting 40 C.F.R. § 1502.14). By failing to compare a 35 Acre Development Existing Access alternative against the expanded access alternatives, the FEIS does not "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a).

[2] See Clear Creek County's website at http://www.co.clear-creek.co.us/index.aspx?NID=230 for more information about the purchase of the Beaver Brook Watershed property: "Using a $5.2 million Lottery bridge loan from the Great Outdoors Colorado (GOCO) Trust Fund, Clear Creek County Open Space acquired the remaining 1442 acres of the Beaver Brook Watershed in April, 2005, securing more time for the U.S. Forest Service (USFS) to complete the purchase and preservation of the scenic wildlife habitat located east of Mount Evans."

[3] 40 CFR 1502.14(c) requires inclusion of reasonable alternatives not within the jurisdiction of the agency.

> Due to a lack of major changes to the ski industry, local area, and subject property, the highest and best use of the Non-Federal Parcel remains limited development with five rural residential homesites (35 acres each), as well as complimentary mountain recreation or ski-area related uses. This type of development on the 177-acre subject property does not require year-round access or wet utilities, and probably generates the highest return to the land at the least risk.

Exh. 7 (Supplemental Report to the Appraisal of Real Property, for the non-Federal parcel, dated September 1, 2014) at p. 12. (emphasis supplied). The Forest Service Appraisal Review confirms that the highest and best use of the LMJV parcel is 5 homesites. 2014 Appraisal Review at 12. The FEIS fails to alert the decision maker and the public that development under existing seasonal "access and lack of wet utilities" is a not only viable, it is probably the most reasonable alternative available to LMJV.

This existing access development alternative differs from the no action alternative in that construction would go forward subject to the considerable federal control and authority based on the Scenic Easement and other encumbrances on the LMJV properties to affect the limited development. Under No Action, there would be no construction at all. As explained in Section 1, the manipulation of the purpose and need resulted in the exclusion of this reasonable alternative.

By eliminating the reasonable alternative of constructing a limited number of houses on existing access, the public and decision maker were denied the "hard look" that would involve the Scenic Easement terms to review the LMJV proposal. Eliminating this reasonable alternative also violates ANILCA by avoiding a NEPA-compliant determination of "what constitutes reasonable use and enjoyment of non-Federal lands and [disclosing the agency is] to authorize only the access needed for such use and enjoyment." (a Colorado Wild, 523 F.Supp.2d 1213, 1227 FN 15 (D.Colo. 2007) citing 36 C.F.R. § 251.114(a). Instead of an alternative limited to what LMJV needs, the Forest Service FEIS only analyzed the access alternatives LMJV wants.

c. Alternatives involving Mitigation Measures and ANILCA Terms and Conditions Were Not Analyzed

Assuming, arguendo, the Forest Service has discretion to grant LMJV additional access under ANILCA beyond what was provided pursuant to the 1987 exchange, the statute requires the Forest Service to consider "what, if any, terms and conditions should be placed on that access to meet other statutory and regulatory obligations and goals" *High Country Citizens' Alliance v.*

United States Forest Service, 203 F.3d 835 (10th Cir.2000) (unpublished) cited by Colorado Wild, 523 F.Supp.2d 1213, 1227 FN 15 (D.Colo. 2007).

A series of "Lynx Best Management Practices" practices and conservation measures are mentioned, but nowhere are these expressed as terms and conditions that would encumber the use of the ANILCA access for construction and operation Village itself. FEIS at 2-48 - 2-49. To the extent that these BMPs are put forward as NEPA mitigation measures, (FEIS at 4-4, 4-7, 4-18) the as-yet undeveloped plans do not pass NEPA scrutiny.

> As with Alternative 2, mitigation measures to re-introduce precipitation runoff into the shallow groundwater through infiltration galleries and/or detention ponds designed to infiltrate would likely be required. A more complete understanding of the shallow aquifer conditions in terms of water table configuration, aquifer parameters and flow directions would be required to adequately address these impacts.

FEIS at 4-35. By its own terms, the FEIS does not adequately disclose, analyze of address impacts or available mitigation measures. For example, groundwater impacts are relegated to later analysis by other agencies

> Mechanisms in place that will require the Proponent to implement mitigation measures for impacts to groundwater recharge and flow include required permits specifying Best Management Practices (BMP's) for stormwater management, surface and groundwater quality protection, and wetlands protection. These permits along with their enforcement provisions are issued by the Colorado Department of Public Health, Water Quality Control Division; the U.S. Army Corps of Engineers; and Mineral County.

FEIS at 4-37, see also 4-96 (discussing potential wetlands mitigation by Corps of Engineers), FEIS App I at 97 (mitigating water quality impact are deferred to Mineral County and Colorado Department of Public Health and the Environment).

The response to comments confirms that no enforceable mitigation measures or ANILCA terms and conditions were included in any of the action alternatives. Instead, the Forest Service deferred to later action by other agencies

> Should an Action Alternative be selected by the Decision Maker, a comprehensive mitigation package will be developed, required, and enforced by the resource agencies as permitted under their respective jurisdictions.

FEIS App. I at 124. The exclusion of mitigation alternatives was further confirmed by the response to comments.

> The Forest Service does not regulate development on private land, but is responsible for protecting resources on NFS lands. The ski area access road of Alternative 2 and the Hwy 160 Village access road and the ski area access road of Alternative 3 would be located on NFS lands. While the Forest Service assumes no responsibility for enforcing laws, regulations or policies under the jurisdiction of other governmental agencies, Forest Service regulations require permittees to abide by applicable laws and conditions imposed by other jurisdictions. The Forest Service will not condition the land exchange based upon the implementation of BMPs and design criteria.
>
> The Record of Decision will specify BMPs and other mitigations for impacts to resources on NFS lands. The Biological Opinion (BO) as issued by the USFWS will specify mitigation measures for impacts to the Canada lynx on NFS and private lands. The USFWS will enforce the terms and conditions of the BO.

FEIS App I at 188 (emphasis supplied). Nowhere does the FEIS consider alternatives that would mitigate the LMJV use of the land that would be removed from the National Forest System by the land exchange.

Agency action cannot be taken before NEPA compliance. 42 U.S.C. § 4332(2)(C) cited by New York v. NRC, 681 F.3d 471, 476 (D.C. Cir. 2012). The FEIS ignores the NEPA requirements that mitigation measures must be developed, disclosed, reviewed, and evaluated for effectiveness throughout the FEIS, with the benefit of review and comment by other agencies and the public. Id.; 40 C.F.R. § 1502.14(d) (include mitigation in alternatives), § 1502.16(h) (examine mitigation in consequences analysis). NEPA disclosure and scrutiny of mitigation must take place before action. Id. Otherwise, NEPA's mandate that agencies "shall […] utilize a systematic, interdisciplinary approach" is reduced to an after-the-fact formality. 42 U.S.C. § 4332(2)(A). Promises of future NEPA compliance cannot remedy an unlawful FEIS or mitigation measures that ignore the Forest Service's NEPA duties. Id.

For the Forest Service to satisfy its NEPA duty to disclose and analyze mitigation measures that would be imposed as ANILCA terms and conditions, the NEPA documents must: (1) "include appropriate mitigation measures not already included in the proposed action or alternatives," and (2) "include discussion of . . . Means to mitigate adverse environmental impacts (if not already covered under 1502.14(f))." 40 C.F.R. § 1502.14(f); 40 C.F.R. § 1502.16(h). "Mitigation" is defined as a way to avoid, minimize, rectify, or compensate for the impact of a potentially harmful action. 40 C.F.R. § 1508.20 (a)-(e). their effectiveness in context of the proposed action and proposed alternatives. 40 C.F.R. § 1502.14(f).

An essential component of a reasonably complete mitigation discussion, and discussion alternative of ANILCA terms and conditions, is an assessment of whether the proposed mitigation measures can be effective. *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1381 (9th Cir. 1998) (disapproving an EIS that lacked such an assessment). The Supreme Court has required a mitigation discussion precisely for evaluating whether anticipated environmental impacts can be avoided. *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 351-52 (citing 42 U.S.C. § 4332(C)(ii)).

A NEPA-compliant mitigation/terms and conditions discussion without at least some evaluation of effectiveness is useless in making that determination. *South Fork Band Council v. U.S. Dep't of Interior*, 588 F.3d 718, 726 (9th Cir. 2009). Agencies cannot rely on untested mitigation measures:

> [T]he Court holds that the Corps' reliance on mitigation measures that were unsupported by any evidence in the record cannot be given deference under NEPA. The Court remands to the Corps for further findings on cumulative impacts, impacts to ranchlands, and the efficacy of mitigation measures.

Wyoming Outdoor Council v. U.S. Army Corps of Eng'rs, 351 F. Supp. 2d 1232, 1238 (D. Wyo. 2005).

Simply listing the mitigation measures, and asserting that they may be successful in eliminating or substantially reducing the Project's adverse impacts, with no scientific evidence or analysis to support those claims, is the definition of an arbitrary and capricious decision. "[T]he Court [cannot] defer to the [agency's] bald assertions that mitigation will be successful." *Id*. at 1252. Mitigation must be "supported by …substantial evidence in the record." *Id*. Without that support, the agency "was arbitrary and capricious in relying on mitigation to conclude that there would be no significant impact to [environmental resources]." *Id.*

NEPA requires that mitigation measures be discussed with "sufficient detail to ensure that environmental consequences have been fairly evaluated." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352 (1989). "[O]mission of a reasonably complete discussion of possible mitigation measures would undermine the 'action-forcing' function of NEPA. Without such a discussion neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects." Robertson, 490 U.S. at 353. Regardless of whether or not mitigation can be legally required, the NEPA discussion of mitigation measures must

There is no suggestion in the FEIS that any BMP or mitigation measure will be enforceable as ANILCA terms and conditions or as encumbrances on the new LMJV parcel. To the contrary, the Forest Service proposes to convey the federal property without the Scenic Easement, relegating oversight of the development to Mineral County. The deficiency in the FEIS is clearly stated in the response to wildfire mitigation comments.

> However, the type and scope of wildfire mitigation for any development resulting from Forest Service approval of either of the Action Alternatives would be determined by Mineral County during the PUD process. The Forest Service does not regulate development on private land.

FEIS at 116. Similarly, the response to comments confirms that the BMPs are not terms and conditions of ANILCA access where "[i]t is therefore the responsibility of the CDPHE, not the Forest Service, to enforce BMPs for the mitigation of impacts of stormwater runoff." FEIS App I at 99, FEIS at 104.

Although ANILCA requires terms and conditions, and NEPA requires analysis of mitigation measures, the FEIS does not examine these key components in context of an action alternative.

4. The No Action Alternative is Inappropriately Dismissed

Objectors raised this issue in their DEIS comments at Page 7. The Forest Service describes the No Action alternative as being included in the analysis only to meet its requirements under NEPA and to "provide a baseline for comparing the effects of the Action Alternatives" (FEIS at pg. 2-1). However, because the agency has no obligation, under ANILCA or otherwise, to provide *enhanced* access to the private parcel, a no action alternative that involves no construction is a real and viable alternative in this case[4]. [5] In fact, the No Action alternative is

[4] See Colorado Wild, Inc. v. United States Forest Service, 523 F. Supp. 2d 1213, 1228 FN. 5 (D. Colo. 2007)

the only one analyzed in this DEIS that meets the agency's obligations to conserve natural resources and recreational opportunities for the public under federal law. Despite this, throughout the document the option of not approving any form of project approval required for construction and operation of the LMJV project, including modified or enhanced road access to the property, is treated only as a straw man. As explained above, comparing the no action alternative to a full range of action alternatives would reveal the impacts of development based on status quo access, include several access options and associated impacts of each, and be bracketed with the full impacts of the VWC construction based on a grade-separated interchange and multiple ingress and egress points on Highway 160.

These impacts of development are not only foreseeable, they were partially revealed in the 2006 FEIS that was later invalidated by agreement of the Forest Service. Exh. 18 (Settlement Agreement – Colo. Wild, 06-cv-02089-JLK-DW, Document 147) 06-cv-02089-JLK-DW Document 147) at 2 ("the purpose of LMJV's application was to facilitate the landowner's plan to develop its 287.5 acre property as a year-round resort village, to be known as the Village at Wolf Creek."). Where the LMJV's purpose remains is to build the Village at Wolf Creek, not building is the correct no action alternative.

A true no action alternative is properly set out as no federal approvals and therefore no construction. However, the Forest Service eliminated this option from the alternatives it could select by a tortured and inaccurate interpretation of ANILCA that was promoted by LMJV and rejected by Judge Kane. *See section1 above.* Moreover, the Scenic Easement supports the Forest Service ability to review and object to LMJV's development proposals and therefore prevent construction. Where LMJV proposes a 1171-unit development, no action is a reasonable alternative.

It should be noted that LMJV accepted the 1986 land exchange with access provided only by Forest Service Road 391. The Draft ROD and FEIS introduce a new interpretation (ROD, Page 21) claiming it would be "disingenuous" to suggest that the original exchange was intended to rely only on FR 391 for access. (See map in the Amended Decision Notice & FONSI, Sept. 29, 1986). This map clearly shows that the corner of the parcel does NOT touch highway US 160. It is difficult to imagine this would have gone without notice at the time.

[5] If the Forest Service's interpretation of its requirements under ANILCA was correct, and the agency did indeed have an obligation to provide greater road access than is current provided by Forest Road 391, then it would be impossible for the agency to select the No Action alternative, which would both mislead the public and constitute an illegal foreclosure on one end of the reasonable range of alternatives which must be considered under NEPA.

Note that the original decision Notice for the then-proposed land exchanged, dated February 20, 1986, stated the following:

> Disposal of the Federal parcel as proposed in Alternative 2 or 3 would create an isolated, developed non-Federal parcel in a large area of solid Federal ownership. Historically disposal of public land in this setting has resulted in a need for landownership adjustments to reconsolidate public ownership for more efficient and cost effective management of the National Forest System.

Id. at 2. The no action alternative was selected in this Decision Notice. Indeed, the Exchange Agreement confirms a five year window for LMJV to obtain expanded access beyond FS 391:

> At the closing provided by paragraph 13, the Landowner agrees to grant to the United States a perpetual easement for public access across the real property described in Schedule "B" along existing Forest Route 391, such easement to be described in the survey referenced in the foregoing paragraph 2; provided, that said easement shall expressly provide for the substitution therefor of an alternate access route to be determined by Landowner, subject to the reasonable approval of the United States, to be conveyed to the United States at any time within five (5) years from the date of closing. Upon conveyance of such substitute easement to the United States, the easement along Forest Route 391 shall be relinquished to the Landowner or its assigns.

Exh. 41 (1986_10_15 Exchange Agreement). The failure of LMJV to timely obtain "substitution" access directly contradicts the FEIS' suggestion that the land exchange is necessary to fix a "mistake" asserted for the first time in the FEIS.

The Forest Service's amended Decision Notice changed this decision to approve a land exchange. It also adjusted the exact boundaries of the lands to be exchanged. Since the Forest Service and the proponent were clearly aware that the then-proposed exchange would create an inholding (private land surrounded by national forest land), this adjustment could have allowed access to Highway 160, but it did not. Rather, the change was made only to better equalize the values of the land being traded and to minimize the need for cash equalization, as required by the Federal land Policy and Management Act. See Amended DN at 1.

As a result, the FEIS misleads the public and decision makers regarding the Forest Service discretion to deny access and therefore deny construction of any of the three proposed

conceptual configurations. In a response to comments the FS acknowledges that the No Action Alternative "could not be selected because it failed to provide adequate access under ANILCA". *FEIS Appendix I, p. 73*. The Forest Services continued assertion that its hands are tied based on ANILCA is unfounded and illegally taints the entire NEPA analysis. A e No Action Alternative based on no changes to existing property interests and no construction is a viable option for the public and decision makers to consider, and the foreclosure of the Forest Service ability to select this alternative renders the FEIS and DROD arbitrary, capricious, and an abuse of discretion.

5. The Forest Service Failed to Incorporate the Input of Several Key Cooperating Agencies

This issue was raised in Objectors' DEIS comments at page 8.

Early in the NEPA process, the important role of other agencies with jurisdiction and special knowledge was recognized, and the Forest Service sent invitations to potential cooperating agencies. Exh. 19 (78763_FSPLT3_2392469). However, the Forest Service violated a core requirement of NEPA, by excluding all cooperating agencies from NEPA process.

> The U.S. Fish & Wildlife Service and the U.S. Army Corps of Engineers both accepted the Forest Service's invitation to become a Cooperating Agency. However, the Forest Service, in order to simplify and expedite the NEPA process, decided not to have any Cooperating Agencies.

II FEIS, Appendix I, Page 71. The FEIS should be scrapped and scoping notice for a new EIS should be issued on that basis alone.

Consistent with NEPA's "one EIS" requirement, agencies of the federal government are required to cooperate in the analysis of a federal action to ensure a comprehensive and efficient analysis of the impacts on the environment from the perspective of present and future generations. 42 USC §§ 4331(a), 4332(2). The NEPA regulations implement the mandate that Federal agencies prepare NEPA analyses and documentation "in cooperation with State and local governments" and other agencies with jurisdiction by law or special expertise. 40 CFR §§ 1501.6, 1508.5. This requirement is consistent with the NEPA mandates that prevent the federal officials from manipulating and segmenting analysis of a project so as to avoid the required analysis of the full project by sweeping difficult problems under the rug. Thus, it is mandatory for all federal agencies to be included as cooperating agencies where such agencies have jurisdiction or special expertise. Although it is not mandatory for all federal, state, and local governments to participate, it is the lead agency's duty to take the necessary steps at the

"earliest possible time" to provide a meaningful opportunity for such government entities to participate as cooperating agencies. Instead of relying on an isolated and segmented approach, the Forest Service must utilize the analysis and proposals of the "cooperating agencies" to the "maximum extent possible." 40 CFR §§ 1501.6(a)(2).

Failure to invite and include cooperating agencies in the NEPA process violates NEPA. *Colo. Envtl. Coalition v. Office of Legacy Mgmt*., 819 F. Supp. 2d 1193, 1215-16 (D. Colo. 2011)(sending a draft for comment fails to satisfy lead agency duties). Federal agencies with jurisdiction and special expertise are subject directly via NEPA's "one EIS" requirement and via the cooperating agency provision. An EIS is legally infirm when the lead agency completes the NEPA process without the involvement of the other federal agencies that wield federal authority and control over the project. Applicable regulations that require invitation also require that "[u]pon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency." 40 C.F.R. § 1501.6. Whether the lead agency fails to invite agencies or the "other Federal agency" is not included as a cooperating agency, the absence of cooperating agencies violates the "one EIS" requirement, serves to segment the NEPA analysis of the "major federal action." 40 CFR §§ 1501.6, 1508.5.

The Forest Service has ignored its lead agency responsibilities by striking out alone on yet another segmented NEPA analysis that fails to provide the required "hard look" at the problems posed by the major federal action – LMJV's proposal to construct a residential and commercial development at the top of Wolf Creek Pass within the boundaries of the ski area boundary. The FEIS confirms that the Forest Service rejected participation of all cooperating agencies. This unlawful approach insulates and elevates the Forest Service to lone agency in charge of the federal action, despite jurisdiction and special expertise of other federal agencies. Inviting the participation of "cooperating agencies" on the LMJV proposal is necessary to examine the full range of infrastructure problems and environmental impacts, including those that flow from providing access beyond what was established by the dubious 1986 land exchange. It is important to note that the 1987 land exchange also relied on an unlawfully segmented NEPA analysis where cooperating agencies were not involved, as shown below.[6] By ensuring full NEPA participation of these cooperating agencies, the public will receive the benefit of the other agencies' independent expertise in identifying and addressing alternatives that may avoid the impacts caused by development of the federally encumbered parcel. San Luis Valley Ecosystem Council v. U.S. Fish and Wildlife Service, 657 F.Supp.2d 1233 (D.Colo. 2009) ("The public has an undeniable interest in the [government's] compliance with NEPA's environmental

[6] Increasing the impact of the dubious 1986 land exchange is not the only alternative. The Forest Service does have the power to condemn, purchase, or pursue a land trade that would minimize further damage by returning this parcel to the public domain.

review requirements and in the informed decision-making that NEPA is designed to promote.") *quoting* Colorado Wild, 523 F.Supp.2d at 1223.

A key deficiency in the previous NEPA process was an insular approach where the Forest Service allowed contractor bias and undue influence by the LMJV to undermine the public interest in an objective and fair NEPA process. Colorado Wild Inc. v. United States Forest Service, 523 F.Supp.2d 1213 (D.Colo. 2007(emails support allegation that "improper influence by LMJV and resulting contractor bias 'compromised the objectivity and integrity of the NEPA process.'" Citing Ass'ns Working for Aurora's Residential Envt. v. Colorado Dep't of Transp., 153 F.3d 1122, 1129 (10th Cir.1998) (internal quotations omitted). It appears that the same insular approach taken in preparing the current FEIS also resulted from improper LMJV involvement and influence on the NEPA process, as is demonstrated below from the administrative record.

Despite an MOU limiting the Proponent's participation, Exh. 20 (78763_FSPLT3_2392675), basic NEPA decisions such as invitation of cooperative agencies were presented to LMJV via Adam Poe for review and approval. Exh. 21 (78763_FSPLT3_2392679). When internal Forest Service emails proposed "bypassing the corr dbase due to internal *@#?!," an alternate means of contacting state and federal agencies was presented to and approved by LMJV's agent Adam Poe via an email stating "Masterful. Go for it." Exh. 22 (78763_FSPLT3_2392682). When other comments were made, Poe chimed in again. Exh. 23 – (78763_FSPLT3_2392683).

The email chain involving Adam Poe reveals the real issue was LMJV's ongoing reluctance to work with Environmental Protection Agency and others "in analyzing impacts." Exh. 24 - 78763_FSPLT3_2392684. Although the record available to the public remains incomplete, it is reasonable to infer that LMJV's agent Adam Poe exerted his influence to convince the Forest Service to unlawfully abandon the involvement of EPA in the NEPA process, thus reducing the cooperating agency to the role of mere commenter. *Colo. Envtl. Coalition v. Office of Legacy Mgmt*., 819 F. Supp. 2d 1193, 1215 (D. Colo. 2011) (EPA NEPA comments not sufficient to satisfy cooperating agency duties).

The FEIS must be scrapped because the Forest Service NEPA process remains compromised by LMJV's successful lobbying of the Forest Service to exclude cooperating agencies and therefore sweep difficult issues under the rug. The "cooperating agency" requirement cannot be remedied at this late stage in the NEPA process. Instead, the Forest Service needs to return to scoping, where the NEPA analysis can be constructed in a full and open manner that reveals the full range of impacts and alternative courses of action beyond the same access configuration identified by the current action alternatives. By meeting this requirement, the analysis benefits

the fullest range of federal, state, and local government agencies and the public interest, and not just the parochial interests of the Forest Service and the land exchange proponent.

6. ANILCA and Existing Forest Service Regulations Do Not Require Enhanced Road Access be Provided to the Federally Encumbered LMJV Parcels

This issue was raised in Objectors' DEIS Comments at page 9 and is based on information revealed subsequent to the DEIS comment period.

Additional ANILCA access is not required where "[a]fter considering legal permissibility, physical possibility, financial feasibility, and maximum productivity, the appraiser concluded the following Highest and Best Uses [of the LMJV parcel] is 'five rural residential homesites, with complimentary mountain recreation or ski-area related uses.'" Exh. 3 (9/15/2014 Appraisal Review Proposed Village at Wolf Creek Land Exchange) at 8 *quoting* Exh. 7 (Supplemental Report to the Appraisal of Real Property, for the non-Federal parcel, dated September 1, 2014) at 5. The appraisal states that,

> Due to a lack of major changes to the ski industry, local area, and subject property, the highest and best use of the Non-Federal Parcel remains limited development with five rural residential homesites (35 acres each), as well as complimentary mountain recreation or ski-area related uses. <u>This type of development on the 177-acre subject property does not require year-round access or wet utilities, and probably generates the highest return to the land at the least risk.</u>

Id at 11. Although LMJV demands access consistent with a high risk development proposal, ANILCA only requires reasonable access. Colorado Wild Inc. v. United States Forest Service, 523 F.Supp.2d 1213, 1227 FN15 (D.Colo. 2007).

When determining whether enhanced access is needed for a given inholding, the FEIS indicates the Forest Service officials are supposed to be guided by regulations implementing ANILCA which dictate comparison with the uses made of similarly situated properties:

> "The authorizing officer shall determine what constitutes reasonable use and enjoyment of the lands based on contemporaneous uses made of similarly situated lands in the area and any other relevant criteria." (FEIS at 1-18)

After a tortured explanation and ignoring the federal property interests in the LMJV parcel, [7] the DROD conveniently does "not find a property 'similarly situated' to the LMJV inholding in size and location other than those already on a public road" that could be used for comparison to determine if existing LMJV access allows reasonable use and enjoyment. DROD at 21. The DROD does identify numerous similar parcels, but finds a way to distinguish each and every parcel, thus rendering the LMJV parcel "unique." DROD at 11-21, FEIS at 1-18 – 1-26.

By contrast, the appraisal used to justify the land exchange identified numerous comparable nearby parcels with similar or greater values to the LMJV parcel that enjoy reasonable use and enjoyment and significant per/acre value with seasonal access.

Seller Buyer	Sale Date Sale Price	Land Area Price/Acre	Access Type	Description and Comments
Fawcett Family Trust	Oct-2012	155	FSR 648	Mineral County (north of Pagosa Springs), San Juan. N.F. inholding
Mark W. Young	$2,500,000	$16,129	Seasonal	West Fork San Juan River, Born Lake, improvements had no value
Bar RC Ranch, Inc.	Dec-2010	160	FSR 781	Saguache County (southeast of Sargents), Gunnison N.F. inholding
Marguerite VillaSanta	$1,350,000	$8,438	Seasonal	Needle Creek, meadows, good views, improvements worth $350,000
Pamela Lynd Trust	Aug-2013	340	FSR 631	Archuleta County (northwest of Pagosa), San Juan N.F. on three sides
CLX Holding Company	$2,300,000	$6,765	Year-Round	Conservation easement allows one home, home/barn worth $550,000
Poma Family Trust	Aug-2012	760	FSR 631	Hinsdale County (northwest of Pagosa), San Juan N.F. on three sides
Heirloom 1, LLC	$6,600,000	$8,684	Seasonal	Distressed seller, fire impact, major creek, ponds, old improvements
Fran DeTure	Listing	160	FSR 524	Mineral County (southwest of Creede), Rio Grande N.F. inholding
Available	$2,195,000	$13,719	Seasonal	Trout Creek, two-thirds inside Wilderness Area, access by easement
Powderkeg Ranch, LLC	Listing	463	FSR 665	Archuleta County (east of Pagosa), adjoins San Juan N.F. two sides
Available	$2,990,000	$6,458	Seasonal	Powderkeg Ranch, most was acquired in Aug-2005 for $2,475,000
MT Saunders, LLC	Listing	160	FSR 663	Archuleta County (southeast of Pagosa), San Juan N.F. inholding
Available	$1,275,000	$7,969	Seasonal	V-Rock Ranch, acquired in May-2001 for $1,210,000, two cabins

Exh. 7 (Supplemental Report to the Appraisal of Real Property, for the non-Federal parcel, dated September 1, 2014) at 18. The appraiser made adjustments to increase the similarities of the comparables, and the Forest Service accepted the appraisal. Exh. 3 (9/15/2014 Appraisal Review Proposed Village at Wolf Creek Land Exchange). By arbitrarily eliminating every similarly situated property, the ANILCA determination in the DROD and FEIS is arbitrary and capricious.

[7]" In reviewing the public comments regarding ANILCA, I've noticed a fundamental misperception regarding this statute. Congress enacted ANILCA for a variety of reasons including to ensure access to private land within the boundaries of the National Forest System. Congress did not suggest that it was providing for Federal regulation of private property within the boundaries of the National Forest System. Private land use regulation remains the province of local government." DROD at 11.

As a matter of law and fact, there is no basis for the conclusion that LMJV has any ANILCA entitlement to expand the seasonal access via FSR 391 that it obtained in the 1987 land exchange. Instead, the value of nearly all the comparable parcels with limited seasonal access exceeded the Lynd Parcel, which has year round access. Exh. 7 (Supplemental Report to the Appraisal of Real Property, for the non-Federal parcel, dated September 1, 2014) at 18

Section 321 of ANILCA states that the Secretary of Agriculture shall provide sufficient access to private inholdings with National Forest lands to "secure to the owner the reasonable use and enjoyment thereof." However, this obligation comes with broad discretion for the Secretary to determine what constitutes "adequate access" as well as "reasonable use and enjoyment." Furthermore, the obligation comes with authority for the Secretary to impose terms and restriction on the access provided, and requires that the access provided may not be in violation of any other provision of law, such as the Forest Service's obligation under the Endangered Species Act. In the proposed project, the access and use of all lands must not jeopardize the continued existence of the Canada lynx, which relies on the Wolf Creek Pass area to move between core areas of habitat. (See below for further discussion of impacts to lynx and other wildlife.).

The basic premise within this FEIS that the "the reasonable use and enjoyment" of the property should include full-scale commercial and residential development assumes that this phrase in ANILCA is a full entitlement to whatever scale of access is necessary for the intended use, regardless of impacts to public lands. However, it is clear that the statute intends to give the Secretary of Agriculture the authority to determine what type of access is deemed adequate, and that according to the regulations interpreting and implementing ANILCA, the access is supposed to be "consistent with [the access provided for] similarly situated non-Federal land and that minimizes damage or disturbance to National Forest System lands and resources" (36 CFR §251.110-114). As detailed below, a large-scale development such as the proposed Village at Wolf Creek is not a reasonable use of the property in question, and the proposed access would be inconsistent with what is provided for similarly situated non-Federal lands (to the extent that there are any similarly situated private inholdings at 10,300 feet of elevation on top of a high mountain pass that sees significant public recreational traffic). Providing enhanced road access to the property would clearly not minimize damage or disturbance to National Forest System lands and resources; in fact, it would specifically facilitate accelerated natural resource damage in an extremely fragile subalpine environment.

The reasonable uses of a property that was previously publicly owned, is surrounded by public lands, and is accessed by a high-maintenance public highway should be consistent with public usage in the area. The development and construction of high-end, privately owned properties

that will only be available for the enjoyment of a select few and the economic benefit of even fewer is not in the spirit of the access provisions of ANILCA or the original land exchange that created the current property. It is undeniable that minimizing the environmental effects to natural resources is best achieved by maintaining the status quo.

The access provisions contained within ANILCA were added to protect pre-existing properties that became inholdings as a result of large public land and national park designations. The property held by LMJV was created in exactly the opposite way: a new inholding was created through an ill-conceived land exchange. Although it is not within the authority of the Rio Grande National Forest to interpret Congressional acts, it is valid to point out that access to inholdings created by ill-conceived land exchanges were not the focus of the ANILCA access provision.

Furthermore, there are dozens of other similarly situated inholdings on the Rio Grande National Forest for which access is provided via dirt or gravel roads and snowmobile access during winter.[8] Ostensibly these properties all enjoy "reasonable use and enjoyment," and the Forest Service gives no justification in the DEIS for why the LMJV property deserves enhanced road access, other than the owner's apparent interest in developing a large-scale residential and commercial enterprise. Through an inappropriately narrow analysis of "Similarly Situated lands" the FS concluded that "none of the 35 properties located in close proximity to a ski area were considered "similarly situated" for determining the reasonable use and enjoyment of the LMJV inholding." FEIS at 1-27. The fact that no other FS action has ever created such an absurd "inholding" speaks volumes to the inappropriate nature of such a large development in a very sensitive high alpine setting. This important piece of public land should never have been divested of, and allowing access based on the lack of similar situations does not lend credit to this decision. Does this mean the Rio Grande National Forest would grant a similar demand from any other property owner with a unique inholding?

In section 1.7.3, the FEIS states that the validity of the 1986 Land Exchange that created the inholding was not evaluated and was beyond the authority of the Forest Service, yet certain assumptions were made during that process about the potential future use of the property, and public acceptance of the land exchange was contingent on these assumptions. In Appendix K of the original Environmental Assessment for the Proposed Wolf Creek Land Exchange, the facilitator (Western Land Exchange Company) outlined a "liberal but reasonable analysis" of likely future expansion. This analysis yielded a proposed 208 unit maximum based on need and

[8] There are private inholdings on Beaver Creek, Alamosa River Headwaters, Red Mountain Creek, Lime Creek, and others. These properties enjoy access mostly via dirt or gravel roads which are not plowed in winter, necessitating snowmobile access, as Forest Road 391 would already allow for the LMJV property. Of 19 inholdings on the Divide Ranger District, Rio Grande National Forest, only 5 have plowed road access. Draft ROD at 13-14.

an assumed maximum of 9,000 skiers per day with no additional traffic impact[9]. This is in stark contrast to the 497 units assumed in the moderate density scenario and the 1711 units in the maximum density scenario of Alternative 2 in this FEIS. (Id. at 2-7, 2-8.) If we assume the density scenarios in the current FEIS were developed with input from the LMJV, then this striking difference in scope of the proposed development reflects how much the LMJV's ambitions have metastasized over time. Certainly in its current form, the Village at Wolf Creek proposal falls far outside the definition of "reasonable use" and the intent of the law.

ANILCA was written to provide fair access for landowners to pursue their reasonable activities. Reasonable use was intended to include economic pursuits such as timber harvesting, mineral prospecting, commercial fishing, and similar activities. ANILCA was not intended to facilitate large-scale commercial development involving multiple businesses. In the case of Wolf Creek, the Forest Service retains significant discretion and can simply deny the request for access, especially in light of the history of the 1986 land exchange (i.e. the developer knew exactly what he was getting, and apparently believed at the time that access via Forest Road 391 was sufficient.).

Further evidence of the discretion available to the Forest Service is provided by the Secretary of Agriculture's interpretation provided in a Forest Service Handbook (FSH 2709.12 Road Rights-of-Way Handbook Chapter 6- ANILCA, 9/86 Supplement 2) which states "*The kind of access granted an in holder is a discretionary decision based on individual facts and circumstances*". The Handbook continues in paragraph f): "*Access authorization shall be issued only to the landowner of the non-Federal land to be accessed. Authorization will not be issued to renters, agents, contractors or other third parties, except public road agencies*." In the current situation the developer intends to use the access primarily for "renters, agents, contractors, and other third parties." Such use is outside the purpose of ANILCA. It appears the facts and circumstances in this case are much different than those examined by the 9th Circuit Court of Appeals in the landmark ANILCA decision *Montana Wilderness Association vs. United States Forest Service.* The proposed land use is different, and more importantly the landowner's role in the property and its use is much different. ANILCA does not seem to anticipate an absentee

[9] The Environmental Assessment for the original 1986 land exchange notes that "Access to the selected land from the highway will be at the existing ski Area access point. No impact to the access is expected to result from the proposed development of the selected land. New access construction is scheduled by the Department of Highways for 1986 and it has been designed to accommodate all potential expansion at the Wolf Creek Ski Area. Since residents of the proposed development would primarily be users of the ski area during winter (the maximum use period for the access point) and because the availability of lodging at the ski area would reduce the maximum number of behicles (sic) entering and leaving through the access point daily, no additional impact due to private land development at Wolf Creek Pass is foreseen".

owner, but rather was written so that the owner could physically occupy and make use of his/her land, which is clearly not the purpose behind the LMJV's proposal for the Village at Wolf Creek.

The FEIS is based on the arbitrary contention that in this instance, the Forest Service has no choice but to offer "improved" year round commercial access via ANILCA or a land exchange. FEIS App. I at 73-74, 76; Draft ROD at 21 (FS not able to choose No Action Alternative). Based on ANILCA's plain language the legislative intent behind ANILCA, it appears that the FEIS and ROD continue to accept LMJV's erroneous claim of entitlement and fails to acknowledge the range of discretion available to the agency. The LMJV demand for more access should be rejected as contrary to law and fact and a finding be entered that LMJV enjoys reasonable access based on the interests conveyed and reserved during in the 1987 land exchange.

7. The Proposed Land Exchange is Not in the Public Interest

Objectors raised this issue in their DEIS Comments at page 12.

As a federal agency managing real estate, natural resources, and other property belonging to the public, the Forest Service is required to make a decision that serves the public interest (36 C.F.R. 254.3(b)). This requirement was recognized in the DROD, which concludes the land exchange is in the public interest. DROD at 24. However, this DROD determination fails to provide any page cites or otherwise identify supporting analysis from the FEIS. DROD at 25. For example, the determination is based on the suggestion that "WCSA appears to support the proposed exchange." DROD at 25 #5. Nothing in the FEIS or Administrative record support the suggestion that WCSA supports the proposed LMJV development.

The key factor in any land exchange is equalization of values. 36 C.F.R. § 254.3. However, this factor question was explicitly excluded from NEPA analysis and NEPA comment. FEIS at 1-30 (discussion of 2011 Feasibility Analysis added between DEIS and FEIS). Critically, the appraisal was excluded from NEPA analysis altogether. FEIS App. At 81. The rationale for excluding the appraisals was given in the response to comments.

> Appraisals are not line officer decisions subject to appeal. They are developed by trained and licensed professionals and are technically reviewed and the conclusions approved for agency use by trained and licensed professionals.

FEIS App. I at 81; Exh. 25(FOIA Letter in WIP RGNF) at 3 ("appraisal reports and appraisal review reports are <u>not</u> part of the NEPA analysis")(emphasis in original). As addressed more completely in Section 10 below, the FEIS does not disclose the fact that the Forest Service

instructed the professional appraisers to ignore accepted methodology applicable to development parcels in favor of a Comparable Sales approach. Had this Feasibility Analysis and appraisals been presented for NEPA analysis and comments, which they were not, the Forest Service departure from accepted professional methodologies could have been identified by commenters and then corrected.

Instead of NEPA analysis based on NEPA procedures, the FEIS simply parrots the predetermined outcome set out in the "Feasibility Analysis, completed at the outset of this project and signed by Rio Grande NF Supervisor Dan Dallas, [which] contains a "Public Interest Determination." FEIS App I at 82-83, Draft ROD at 24-26. Such predetermined outcomes are prohibited by NEPA, and renders the FEIS and the ANICLA public interest determination invalid. "[T]he comprehensive "hard look" mandated by Congress and required by [NEPA]must be timely, and it must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made." *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000).

Far from analyzing the public interest, the FEIS and DROD are biased toward facilitating a private interest, that of developing a revenue-generating residential and commercial facility. There is an attempt to weigh the private interests against the established public interest in maintaining the existing character of the Surrounding National Forests and WCSC. There is no recognition that "thousands of public comments submitted on the draft EIS, the majority of which reportedly opposed [the land developer's] access request and development plans, also demonstrate the public interest in maintaining the status quo…" *Colorado Wild, Inc. v. United States Forest Service,* 523 F. Supp. 2d 1213, 1213 (D. Colo. 2007).

Legal error concerning the status of the LMJV parcel hides the public interest in using existing limitations to deny access and enforce existing encumbrances.

Where the public interest determination was issued by Dan Dallas in 2011, it is no surprise that the issues raised during the comment period were ignored in the FEIS. The restatement of the 2011 determination in the FEIS and DROD ignores the fact that the land exchange does not serve the public interest because it will:

- "harm lynx habitat and the functionality of a critical linkage for lynx and other wildlife (see Section 12),
- "cause degradation of wetlands and of water quality (See Sections 11 and 14)
- "create a new Wildland-Urban Interface (WUI) in a beetle-kill zone, thus increasing wildfire dangers (See sections 12 and 13),

- "create a new public burden of snow removal and storage, along with other new public infrastructure burdens (see sections 9a and 9b), and
- "cause economic harm to surrounding communities, most notably Pagosa Springs and South Fork"

DEIS Comments at 12 -13. In short, the NEPA process was a nullity, with the outcome unlawfully predetermined by the Forest Service in 2011. Metcalf v. Daley, 214 F.3d 1135 (9th Cir. 2000)("hard look" is not provided where EIS is a "subterfuge designed to rationalize a decision already made.").

8. The Benefits of the Proposed Action for the Public are Overestimated

Objectors raised this issue in their DEIS Comments at pages 13-15. Throughout the FEIS, a number of public benefits of the Proposed Action are assumed or alluded to. In fact, the feasibility analysis completed in January 2011 relied upon the finding of a number of potential benefits for the public interest, including a net gain in wetlands and a net gain in perennial and intermittent streams (FEIS at 1.4, pg. 1-5). However, several of these purported benefits to the public would be substantially undermined by factors related to the scale and type of development that were not properly accounted for in the FEIS. The environmental analysis of the Proposed Action cannot rely on potential benefits of the land exchange without accounting for the impacts of the large-scale development the land exchange is meant to materially facilitate. Those impacts would, in many cases, significantly decrease or erase the purported benefits to the public.

One of the main potential benefits of the land exchange cited throughout the FEIS is the transfer of wetlands on the LMJV property to Federal ownership, ostensibly leading to their preservation. However, anyone who has visited the area during the summer months (when residents and visitors would most likely be vacationing at the Village) would understand the significance of mosquitos in the area. The abundant mosquito population very likely comes from the significant wetlands, including wetlands that the DEIS argues will be preserved. Comfort for Village residents and visitors thus would inevitably require mosquito control. For any effective job to be done in this regard, much or all of the wetlands would have to be sprayed, killing not only mosquitos but other insects that support various animals and plants. In this event, the "preservation" of wetlands cited as a benefit in the public interest calculation will be dubious at best. Not to mention the impacts of construction and utilization of Village facilities on the adjacent wetlands. Increased water usage, waste discharge, human impacts, and other actions will all negatively impact these fragile wetlands.

The inverse proposition is also suspect: it is implied in the Forest Service's valuation of the acquisition of the wetlands for Federal management that they could be lost to development if they remained in private control. However, this supposition itself rests on two assumptions: 1) that the private property owners would be able to obtain the necessary permits to develop the property in a way that would result in loss of the wetlands, and 2) that the private property owners would seek to develop on a scale that would threaten the wetlands if they did not secure the land exchange they are proposing. Both of these assumptions are dubious. Wetlands, especially fen wetlands, are an extremely rare and fragile ecosystem type, one that is protected by a variety of Federal and state rules which would make it difficult to secure the necessary permits to enact a development on the property that would substantially harm the wetlands thereon.[10] Furthermore, if the private property owner's development plan is dependent on eventually gaining the enhanced road access necessary to support a large-scale residential and commercial development, then such a development is unlikely to occur (at least not anywhere close to the scale contemplated by the LMJC currently and analyzed in this FEIS) if the Forest Service denies the request for the Proposed Action. Thus, any "threat" of losing the wetlands that is implied if the Forest Service does not grant the proposed land exchange is largely hollow.

Meanwhile, the Forest Service disclaims responsibility for assessing the financial viability of the development. *FEIS at 1.7.4, p. 1-14, Financial viability - not the responsibility of the Forest Service to assess).*

Yet many of the benefits claimed by the applicant as the basis for the land exchange assume success of the development (i.e. creating jobs, generating revenue, bolstering the economy via short-term and ongoing influx of outside money, and local municipality tax revenue). The Forest Service cannot assume these benefits will come to pass without any analysis of the financial viability of the development.

Contrary to the conclusion in the FEIS that the Proposed Action is in the public interest and would likely convey a number of benefits to the public, the development may actually expose the residents of the San Luis Valley, particularly members of the San Luis Valley Rural Electric Cooperative (SLVREC), to significant financial risk. In 2010, Grand Valley Power lost a legal battle with the Gateway Canyon Resort, forcing the rural electric cooperative's members to foot the bill for a significant power line expansion (the Unaweep power line). Wolf Creek may be similarly situated, yet the FEIS fails to discuss or assess the potential for a similar outcome, which could force rate increases upon SLVREC members as in the Grand Valley case. Key

[10] Fens cannot be considered a renewable resource, as in-kind replacement is not possible. See FWS, 1999, at 3. Similarly, the relevant Forest Service policy considers fens irreplaceable. See USFS, 2002, at 1. It is questionable at best that the Army Corps of Engineers would issue a permit for adverse alteration of these areas.

questions in making this assessment include 1) whether SLVREC has an upgrade of the capacity needed to supply the Village at Wolf Creek in their long-range work plan, 2) what other loads exist on the line (including Wolf Creek and the potential ski area expansion there), and 3) what is the current status (i.e. capacity, usage, etc) of the existing power lines. Yet the FEIS fails to adequately disclose whether any of these factors were considered in its conclusions about potential costs to others in the area. Such risks must be assessed and factored into the "public benefit" equation.

In all likelihood, the developer will at some point hand over management of the Village at Wolf Creek to a newly formed HOA or metro-district. Should the development not maintain its property values, this HOA or metro-district will go broke, as has happened in other ski resort-related development scenarios.[11] And if not, even the LMJV could at some point tire of funneling cash into a failing development, potentially leaving the Forest Service (and by extension the public) with a completed but underutilized development on a neighboring property, conferring all the potential negative environmental impacts without any of the purported economic benefits.

9. The Consideration of Connected Actions and Indirect and Cumulative Impacts in the DEIS is Inadequate

This issue was raised in Objectors DEIS Comments at pages 15 -19. The FEIS Fails to Assess Connected Actions per CFR 1508.25, which provides what amounts to a regulatory "checklist" for defining actions that are connected to the proposed action in a NEPA analysis. Actions are said to be connected if they:

i. Automatically trigger other actions that require the preparation of EISs,
ii. Cannot or will not proceed unless other actions are taken either before them or simultaneously, and
iii. Are independent parts of a larger action and thus dependent on that action for their justification

The FEIS acknowledges that the proposed action will result in development occurring on the exchanged parcel. This is an action that 1) will require the preparation of additional NEPA

[11] Several ski areas that were bought or started by private developers with the intention of driving real estate sales have gone bankrupt in recent years. See Cuchara Mountain Resort in Colorado (http://www.coloradoskihistory.com/lost/cuchara.html), Sol Vista / Granby Ranch in Colorado (http://www.coloradoskihistory.com/areahistory/solvista.html), Tamarack Resort in Idaho (http://en.wikipedia.org/wiki/Tamarack_Resort#Bankruptcy), and Yellowstone Club / Yellowstone Ski Resort (http://en.wikipedia.org/wiki/Yellowstone_Club). Ironically, Cuchara Mountain Resort was originally a project of Red McCombs, one of the partners in the LMJV.

analysis, 2) will not proceed unless and until either the land exchange is granted or another form of enhanced road access is provided to the currently held LMJV property, and 3) is the necessary next step in the larger action, of which the Proposed Action would be one initial step. This development will require or can be reasonably expected to result in the following impacts which the DEIS fails to assess:

- Electric power supply needs / upgraded or expanded utility corridors
- Offsite air-quality impacts from expanded electricity generation
- Mosquito spraying
- Natural gas transport
- Communications Infrastructure

Each of the build-out options noted in the FEIS at page 2-6 is an action connected to the land exchange decision and must be assessed as part of this analysis. However, the FEIS only minimally discloses this, much less provides a reasoned analysis of the effects and impacts of these connected actions.

Because the proposed land exchange is specifically designed to facilitate the development known as the Village at Wolf Creek, and if the land exchange were granted it would substantially decrease the number of other permitting and logistical steps needed to proceed with the development plan, the building of a Village at Wolf Creek is a highly likely outcome of the Forest Service selecting the proposed action and granting the requested land exchange. Therefore, all impacts stemming from the Village at Wolf Creek, at whatever density development is ultimately pursued, must be considered as direct impacts for the purposes of this NEPA analysis.

That said, we recognize that the Forest Service faces a challenge in correctly anticipating the true impacts of the Village at Wolf Creek, since many of those impacts will ultimately depend on the increase in skier numbers and local traffic on Highway 160 and on the Pass itself that the Village at Wolf Creek may bring. As we suggested above, there are many examples of developments like the proposed Village at Wolf Creek ending up bankrupt and yielding far less economic benefit (to the owners, the surrounding communities, and the affected county/municipality) than originally projected. However, when anticipating the environmental impacts of the decision to grant the land exchange, the only conservative and rational course of action is to assume the maximum level of development and long-term usage of the Village at Wolf Creek. Thus, a sort of "worst case scenario" (from an environmental degradation perspective) should at least be used to check the Forest Service's inclination to select the Preferred Alternative. The precautionary principle, as well as common sense, about a

development proposal next to sensitive wetlands on a high mountain pass, at 10,300 feet, that is not close to any major airport or city, would require no less.

As we said, a number of the impacts of actions connected to the decision to grant the land exchange are not addressed in the DEIS. We identify some of the factors that deserve consideration for some of these impacts in the following sections.

a. Power Needs

In the FEIS, the Forest Service fails to assess and disclose how the power requirements of the Village at Wolf Creek would be met, without which it cannot make a reasoned determination of whether the existing power infrastructure would be adequate, or whether on-site power production (and its attendant air quality and other impacts) would be necessary, or whether power line expansion (and its attendant impacts) would be necessary.

The Forest Service claims that the existing power lines would be sufficient for the low density development:

> Section 2.4.1.1: Under the Low Density Development Concept… It is also assumed that each home would have a septic system and that electricity would be provided from adjacent power lines owned by the San Luis Valley Rural Electric Cooperative that provides electricity to WCSA. Furthermore, telephone, cable TV and fiber optics would likely be included in the road system.

The FEIS now assumes that the San Luis Valley Rural Electric Cooperative (SLVREC) can provide power for the development concepts. This is based on a statement from the SLVREC, yet how the Cooperative is projecting future energy consumption for a yet to be determined plan for large scale construction and development is not disclosed. This is also contrary to the DEIS which fails to mention Moderate and High Density Development sources of power, except as a footnote in Appendix 11:

> Page 11-6 (Appendix 11): Moderate Density Development Concept… "SLVREC has the infrastructure to provide power for the moderate and a portion of the maximum density development concept… The maximum density development concept will likely require an additional power supply. An analysis of the effect of that power option would be completed in the future when the power source has been identified."

The DEIS at Page 11-7 acknowledges that for the maximum build-out of the Village at Wolf Creek, additional power infrastructure would be needed:

Potential Maximum Build-Out Options include:

1. *SLVREC - Can and are willing to provide power, will require infrastructure upgrade with easement, No additional easements from Forest Service required*
2. *Propane: Requires shipment of propane to project site*
3. *Liquid Natural Gas (LNG): On-site generator, Requires shipment of LNG to project site, Requires gas distribution facility*
4. *Natural Gas Pipeline: Pipeline to be extended from gas supplies west of project site and perhaps to San Luis Valley*

The FEIS at Chapter 11 (Appendices), p. 5 still mentions these potential alternate sources of power; although the FEIS claims they will not be needed.

First, for the low density development how did the Forest Service draw the conclusion that existing power lines are adequate? Similarly, how did the Forest Service determine that upgrades would be required for the high density development, and that SLVREC would provide power? Did the FS rely on any analysis provided by the SLVREC? The FEIS fails to disclose this, or provide any electrical load assessment for any of the development densities. It is impossible to comment on this aspect of the analysis without having this information. While the cooperative is required by law to serve those in its service territory, the details of a line expansion such as this – technical, contractual, legal, and financial – are critical in making a determination about whether such an upgrade is feasible.

Specifically, what infrastructure upgrade would be required of SLVREC, and what easement would be required, and from which entities (Forest Service or otherwise)? How have these determinations been made? It is unlikely that at this point in the process the applicant has performed the necessary studies to determine actual power demand. Without a reasoned assessment of *peak demand* for the Village at Wolf Creek among residents more acclimated to warmer climates (and thus using much more electricity at altitude for heating, hot water, hot tubs, etc.), the Forest Service cannot plausibly make such a determination.

EPA commented that the DEIS should describe the impacts from installation of utility lines at the Village of Wolf Creek as a connected action. The USFS's response to comments states:

> Determining the precise future power needs of the development concepts and their potential environmental effects are beyond the scope of this FEIS, as the purpose of the FEIS is to evaluate access options to the non-Federal inholding. Details of electrical power supply for any future development

> facilitated by Forest Service approval of either of the Action Alternatives would be addressed during the Mineral County PUD process. However, some of the supplemental future power options may require a NEPA analysis. FEIS, Volume 2, p. 84.

Development of the Village at Wolf Creek is a connected action and an indirect effect of the proposed action that is within the scope of this FEIS. Draft ROD at p. 22 and 40 C.F.R. §1508.25(c) and 1508.8(b). EPA raised a legitimate concern that development of utility lines at the Village at Wolf Creek could adversely impact water quality in the area. Under the NEPA regulations, the USFS's response to comments should, "Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response." 40 C.F.R. §1503.4(a)(5). USFS's response also fails to adequately explain why it failed to collect the requested information pursuant to 40 C.F.R. § 1502.22 which requires the agency to either collect the information or explain why it is technically impossible or cost prohibitive to collect the information.

The Forestwide Standards and Guidelines for Utility Corridors, Chapter 3, page III-38-39: Standard 12 states: *Proposals to use designated utility corridors will be authorized without alternative-route analysis, subject to site-specific environmental analysis*. Based on this guidance, one could argue that an alternative route would not be required for analysis. However, if upgrades to utility lines take place within existing utility corridors outside of the private inholding and the utility corridor crosses Federal lands, an additional level of environmental analysis would be required. This additional environmental analysis would be considered a connected action. Without a load and power supply capacity analysis, this conclusion could also apply to the medium and low development density concepts as well.

Regarding propane, there is no discussion of how many truck trips per day/week/month would be required. There is no discussion of safety concerns with hauling propane or natural gas over mountain roads in adverse weather conditions.

The FEIS fails to provide any details about the location and circumstances of the natural gas pipeline that is described in one table within the FEIS as being to the "west of the project site"[12]. Who owns this pipeline? What is its capacity compared with the demand expected from the Village at Wolf Creek load? If an option involving a new pipeline is necessary to supply gas to the Village at Wolf Creek, installing such a pipeline to the San Luis Valley must be

[12] Table A-3, p. A-5 of the DEIS, Item #4, reads "Pipeline to be extended from gas supplies west of the project site and perhaps to the San Luis Valley."

considered a connected action, and the potential environmental impacts must be analyzed. There is no discussion or analysis in the FEIS addressing the potential necessity or environmental effects of such options.

A load analysis must be performed to assess the adequacy of existing infrastructure, and to determine at what point an expansion of that infrastructure would be necessary. Only then can a fair assessment of the energy demands of the Village at Wolf Creek resulting from the proposed action be made, and the sources of that energy be assessed. Then any other permits, effects, and impacts of these connected actions must be anticipated and disclosed in the NEPA process. It is impossible to draw the conclusions cited herein without such an analysis.

b. Communications

Cell phone coverage at the top of Wolf Creek Pass is sporadic to nonexistent. It would be necessary for safety and for business use to have phone service at the Village at Wolf Creek site. It would also likely be necessary for successful real estate sales of the residential and commercial units to have fiber optic lines, cable television, internet, and other media and communications infrastructure. The FEIS states that these utilities would be located in the road corridor. Again, there is not adequate discussion or analysis of a utility corridor(s) for these facilities. It is not clear if there is adequate room to install utilities adjacent to the road within the right of way. The FEIS states that these utilities would be hung from bridges. It is disclosed that these cables would be hung from bridges in order to prevent damage to waterways and wetlands. *FEIS Ch.11 (Appendices) p. 9*. However, it can only be assumed because no detail of utility installation was given in the FEIS. The safety concerns of hanging cables from bridges with winter ice accumulation, snow removal, and potential flood hazards was also not addressed.

The Forestwide Standards and Guidelines for Utility Corridors, Chapter 3, page III-38: Standard 1 states:

> *1. Bury electrical-utility lines of 33 kilovolts or less, and telephone lines, unless one or more of the following applies:*
>
> - *Scenic Integrity Objectives of the area can be met using an overhead line.*
> - *Burial is not feasible due to geologic hazard or unfavorable geologic conditions.*
> - *Greater long-term site disturbance would result.*
> - *It is not technically feasible.*

None of the above stipulations or options were addressed in the FEIS; it can only be assumed that utility lines such as phone lines would be buried, except where they will be "hung from bridges".

c. Air Quality Impacts from Wood Burning Stoves and Fireplaces

This issue was also raised in scoping comments submitted by the U.S. EPA on June 22, 2011 and by the Sierra Club in its September 28, 2012 DEIS Comments (p. 7).

One significant oversight in the FEIS is the USFS's failure to assess the air quality impacts of air pollution emissions from new wood burning stoves and fireplaces that could result from the development on ±325 acres of private land with up to 1,711 new units, including two hotels with 200 units, 16 condominiums with 821 units, 46 townhomes with 522 units, 138 single family lots, and 221,000 square ft. of commercial space. FEIS at p. 2-8.

The proposed development is located a mere 1.5 miles from the Weminuche Wilderness Area—a federal Class 1 airshed. Class 1 airsheds have special protection under the federal Clean Air Act, which seeks to restore such airsheds to natural visibility conditions by 2064. 42 U.S.C. §7491. Pollution emissions from wood stoves and fireplaces include particulate matter, sulfur dioxide, and nitrogen oxides—all of which contribute to visibility impairment. The FEIS considers pollution from existing wood burning as part of the current "local sources of air pollution." FEIS at p. 3-35. The FEIS goes on to acknowledge that the "most likely sources responsible for visibility impact are wood burning…" and other sources (id. at 3-36), but then completely fails to consider that the new development might add 1,500 or more wood stoves and/or fireplaces and the impact of emissions on visibility in the Weminuche. However, the FEIS attempts to foreclose the widespread use of wood burning appliances by stating:

- Fireplaces
  - o Natural gas and/or propane fireplaces and limited wood fireplaces in commercial and public use areas and air quality monitoring will determine when wood can be burned
  - o Spark arrestors and fire protection measures will be incorporated into any wood burning fireplace

FEIS V.2 at p. 4. However, there are no enforceable prohibitions or mitigation measures preventing or limiting the use of wood burning appliances at the Village at Wolf Creek.

d. Diesel Emissions from Construction

This issue was also raised by EPA's comments on the DEIS that state, "[T]he FEIS should include a discussion of potential combustion emissions from any onsite diesel-fired power generators used during construction." *EPA DEIS comment letter, p. 6.*

These emissions could affect compliance with National Ambient Air Quality Standards (NAAQS), as well as impact visibility in the Weminuche Wilderness Area. The FEIS responded by stating, "A discussion of potential combustion emissions from any onsite diesel-fired power generators used during construction of any potential development resulting from Forest Service approval of either of the Action Alternatives and Mineral County approval of a PUD Application is beyond the scope of the FEIS." FEIS. Volume 2, p. 115. Thus, the FEIS failed to address EPA's concern about diesel air emissions during construction. The Draft ROD and FEIS acknowledge that construction of the Village at Wolf Creek is a connected action and indirect effect of approval of the Wolf Creek Access project. ROD at p. 22 and FEIS Volume 1 at p. ES-1-4. As such, the FEIS should have analyzed the impact of diesel emissions resulting from construction of the Village at Wolf Creek.

e. Greenhouse gas emissions:

Objectors raised this issue on page 23 of our DEIS comments.

The USFS declined to assess the indirect impacts of the project on climate change because "there are no methodologies available at this point to predict any impacts." FEIS 4-58. To the contrary, there is a well-established methodology called the "social cost of carbon" which is widely used and available.

A recent case out of the U.S. District Court for the District of Colorado directly addressed this issue. *High County Conservation Advocates, et al. v. United States Forest Service, et al.,* Civil Action 13-cv-01723-RBJ, June 27, 2014 (a copy of this decision is attached hereto). In the *HCCA* case, involved authorization for exploratory coal mining in the Sunset Roadless Area. Plaintiffs alleged that the BLM violated NEPA by failing to disclose the social, environmental, and economic impacts of GHG emissions resulting from the lease modifications. The BLM responded by arguing, "Standardized protocols designed to measure factors that may contribute to climate change, and to quantify climatic impacts, are presently unavailable. . . . Predicting the degree of impact any single emitter of [greenhouse gases] may have on global climate change, or on the changes to biotic and abiotic systems that accompany climate change, is not possible at this time. As such, . . . the accompanying changes to natural systems

cannot be quantified or predicted at this time." To the contrary, the court found that a standardized protocol did exit to quantify the impacts of climate change on specific projects—namely, the social cost of carbon methodology. The court found, "But a tool is and was available: the social cost of carbon protocol. Interagency Working Group on Social Cost of Carbon, Technical Support Document (Feb. 2010); *see* FSLeasing-0041245 at 0041403, 0041404. The protocol —which is designed to quantify a project's contribution to costs associated with global climate change—was created with the input of several departments, public comments, and technical models. FSLeasing-0041245 at 0041403, 0041404-06. The protocol is provisional and was expressly designed to assist agencies in cost-benefit analyses associated with rulemakings, but the EPA has expressed support for its use in other contexts. *See* Sarah E. Light, *NEPA's Footprint: Information Disclosure as a Quasi-Carbon Tax on Agencies,* 87 Tul. L. Rev. 511, 545-46 & n.160 (Feb. 2013) (noting the EPA recommendation to the State Department to "explore . . . means to characterize the impact of the GHG emissions, including an estimate of the `social cost of carbon' associated with potential increases of GHG emissions" in connection with the State Department's review of the Keystone XL pipeline)."

In the Wolf Creek analysis USFS calculated the economic benefits of the various project alternatives using the IMPLAN model. FEIS at Chapter 4-13. However, the USFS neglected to use the social cost of carbon model to assess climate change impacts of the project. The USFS's failure to acknowledge the social cost of carbon methodology, and its failure to employ the methodology in calculating the social and economic impacts in its cost-benefit analysis, violates NEPA and was arbitrary and capricious.

10. The Property Appraisal is Invalid

Objectors raised this issue on page 18 of our DEIS comments.

NEPA violations are established when "the way the agency framed the choices meant that the result was practically predetermined." *San Luis Valley Ecosystem Council v. U.S. Fish and Wildlife Service*, 657 F.Supp.2d 1233 (D.Colo. 2009). As with the FEIS, the Forest Service constrained the appraisals via instructions and assumptions that avoided difficult questions and made the exchange a foregone conclusion. Exh. 7 (Supplemental Report to the Appraisal of Real Property, for the Federal parcel, dated September 1, 2014) at 31-39. Compounding the problems with the appraisal itself, the appraisal was excluded from NEPA scrutiny.

The Forest Service in its appraisal instructions essentially required the appraiser to use the Comparison Sales approach, thereby limiting the value of the federal parcel that LMJV has proposed to develop. The Forest Service should have required the appraiser to pay for

engineering analysis of infrastructure costs used in the more applicable Development Approach. Exh. 7 at 36. However, the Comparison Sales approach is not appropriate alone for appraising the proposed exchange. Comparison Sales are the simplest and cheapest appraisal approach, and most appropriate for rural, undeveloped parcels that will likely remain undeveloped or minimally developed. Development Approach is necessarily more expensive because it examines infrastructure costs of the proposed development. The instruction precluded the Development Approach, and inserted undue influence and bias by refusing to pay the appraiser the added costs associated with choosing anything but the comparison sales approach. Exh. 7 at 36.

The result is an effective prohibition on the use of the Development Approach, which is applicable to the parcel targeted for development. Exclusion of this Development Approach has resulted in the invalidation of jury trials seeking to establish valuation of property. *Rodman v. Commonwealth*, 86 Mass.App.Ct. 500, 17 N.E.3d 479 (2014) (holding valuation improper "where any evidence of the developmental approach to value was prohibited."). If the Development Approach were used for the federal parcel, the value would have increased greatly in relation to the highest and best use of the LMJV parcel based on the existing plan to develop the federal parcel. The appraiser would have needed to pay for engineering analysis and to use the same analysis a sophisticated buyer of the federal property might apply.

The instructions created a foregone conclusion where the appraiser dutifully applied the inapplicable comparable sales methodology to parcels with different highest and best uses. The appraisal used the same comparables for both the federal and non-federal parcels, but decided apparently (though opaquely) that the federal parcel was worth 20% less than the LMJV parcel, regardless of LMJV's proposal to develop the federal parcel.

The limitation requiring the appraisal of only using the comparable sales approach further diminishes the reliability of the appraisal and the FEIS analysis. As explained in Section 6 above, the DROD and FEIS, the Forest Service vociferously insists there are no "similarly situated" properties anywhere within the entirety of the National Forest System, thus it dismisses out of hand the analysis of dozens of similarly situated properties for which seasonal access is reasonable pursuant to ANILCA. But where the FEIS concludes this is a completely unique property with no similar or comparable properties anywhere in the United States, the agency limited the appraisal to a methodology based on similar, comparable properties the FEIS says do not exist. Based on the incomplete record, it is a reasonable inference that this contraction flows from agency bias and undue influence by LMJV.

The appraisal ignores that LMJV does not intend to convey any of the water rights, but will presumably receive the water rights associated with the Federal parcel. Exh. 26 (*FA_response_from_RO).* The Forest Service also has acknowledged that"[b]y keeping the water right/diversion point on the lands to be exchanged to the RGNF (Village Ditch), the use of that right will require establishment of a conveyance system for the water across Forest lands to potential storage facilities." WCV FA at p.12. These issues greatly influence the value of the properties and should have been considered in the appraisals.

The instructions ignore that the LMJV lands offered are encumbered with numerous easements, trails and reservations. It is not clear that the non-Federal party is in, or would be in, a position to convey the full property interest. More important, the instructions require that the appraisal be conducted as if the access and utilities being analyzed in the FEIS had already been conveyed and all special use permits had been converted to easements. Exh. 7 at 37-38. The preordained methodology and Forest Service manipulation of the outcome of the appraisal is consistent with the pattern of NEPA violations. As such, the appraisal cannot be used to support the agency's NEPA duties or the public interest determination of 36 CFR 254.3 (b)(2). In short, the "USDA Forest Service Statement of Work written specifically for the assignment" (FEIS App. I at 81) is arbitrary, capricious and contrary to law. The appraisals cannot serve as the basis for lawful agency action or be used in for NEPA analysis.

11. The Effects on Wetlands are Inadequately Analyzed

This issue was raised in Objectors' DEIS Comments at page 20. The FEIS seems to omit, overlook, or underestimate a number of ways that the wetlands on the properties at issue could be harmed under either of the Action Alternatives. The FEIS quantifies the wetland acres that would be gained through the proposed action and qualitatively assesses the "indirect" impacts from the proposed development but limits these impacts to groundwater recharge and flow disruption and construction activities. Colorado Parks and Wildlife's DEIS Comments noted that:

> Construction of the Village may alter the hydrology of the area, and have profound impacts to the wetlands that currently exist on the area. Impacts to wetlands may adversely affect wildlife species that depend upon wetland habitat.

The following items are listed as potential disruptions to ground water flow:

- Increased number of buildings and impervious surfaces that increase water run-off to streams, and reduce groundwater recharge
- Hotel and residential housing foundations and basements that block ground water flow to wet lands
- Underground parking – potential at the hotel
- Roadway underpass under the ski lift to access the village
- Townhouses located in a potential recharge area north of the school site in the full build-out scenario,
- Snow storage plan will pile snow in areas, which will melt into retention ponds, then divert into streams. This is snow that would have been snowmelt leaching into the ground water system.

See FEIS at 4-88 et seq.

However, no effort is made to quantify their effects on the wetlands. Even if these wetlands (fen wetlands, in particular) are added to the Forest Service's holdings via the land exchange, the adjacent development and allowances for groundwater diversions may have a detrimental impact, negating the original benefit. In fen wetlands, the accumulation of peat is dependent on the nearly constant groundwater discharge[13], and even small water depletions can eventually lead to fen destruction[14].

In assessing the impacts to wetland hydrology, the document supposes that there will be potential impacts to wetlands in the different development concepts. This section should be expanded to highlight both the sensitivity of wetland hydrology (as noted above, see Chimner 2008) and the uncertainty of the current hydrologic regime[15]. It is important to highlight the

[13] See Chimner 2000: *"The nearly continuous groundwater discharge within the fens creates permanently saturated soil conditions. Due to waterlogging and cold temperatures, the rate of decomposition in fens is quite slow. Only a portion of the plant matter that is produced each year can break down under these conditions, thus it accumulates on the soil surface, creating an organic layer that is known as peat. The rate of peat accumulation is slow, and is estimated to average about 8 inches per 1,000 years in Colorado."* See also Chimner and Cooper, 2002.

[14] See Chimner 2008: *"Even small water diversions or depletions created by ground water pumping, water diversions, road or other cuts which intercept ground water flow, can reverse the process of peat accumulation that has been ongoing in many fens for more than 10,000 years and lead to fen destruction. These hydrologic changes can result from a number of human impacts on public lands such as dam building, livestock grazing, irrigation for agriculture, cross-basin water diversions, road construction for home building on private mining claims, timber and energy development, and recreation. Fen protection requires the conservation of watershed processes that provide perennial ground water flow, limit mineral sediment erosion, and preserve fen plant species diversity and production."*

[15] See Williams 2007: *"Groundwater flowpaths to individual wetlands have not been identified and/or delineated. If groundwater flowpaths are not identified before construction activities and consequent remedial activities such as capturing and re-introducing affected groundwaters to the wetlands, there may be a net loss of water to individual wetlands."*

uncertainties of the wetland hydrology since this will directly impact the resources ostensibly to be gained in Alternative 2.

The Forest Service cannot assume the smaller segment of wetlands on the parcel to be exchanged to the LMJV will be protected in the event the land exchange is granted. In Section 4.7.2 (Regulation and Mitigation of Wetland Impacts) of the FEIS, some description of the 404 permit process under the Clean Water Act is included to supplement the discussion of wetland impacts that would be associated with development under the two Action Alternatives. Since the necessary section 404 permit for these impacts and any required mitigation is not the responsibility of the USFS, this section includes a general description of the common practice for obtaining these permits:

> "Generally speaking, most wetland impacts of less than ½ acre can be permitted under a Nationwide Permit, provided that they comply with all of the general and regional special conditions. Many of the Nationwide Permits require a Pre-Construction Notification (PCN), which must be approved by the Corps prior to the commencement of the project. Projects that do not qualify for a Nationwide Permit must follow the Individual Permit process, which includes a more comprehensive application and a full public interest review by the public and State and Federal agencies, including a public notice and comment period and a comprehensive alternatives analysis. In Colorado, most of the Nationwide Permits are revoked for work in fens and wetlands adjacent to fens, therefore these projects require an Individual Permit. For projects within 100 feet of the discharge of springs, the Corps will determine whether the proposed work would have more than a minimal effect to the spring and whether an Individual Permit is required."

The language used in this section implicitly suggests that an Individual Permit would be required for the development which would include public input. This, however, is not necessarily the case, and it should be noted that development of the private parcel could take place without any mitigation or public input as a worst case scenario. Because of this, it should be assumed that transferred or currently held wetlands would be irretrievably lost in Alternatives 2 and 3 since USFS has no control over the section 404 process. The Forest Service simply cannot assume or imply that they have sufficient control over any subsequent Clean Water Act-required processes on a private land parcel to rely on the Individual Permitting requirement to mitigate the risk of harm to the wetlands in Alberta Park. The assertion that there will be "no net loss of wetlands" by the project proponent is just that—an assertion—and not a certainty that the Forest Service can rely on in their analysis of potential environmental

consequences of the Action Alternatives. This is why NEPA mandates that cooperating expert agencies with jurisdictional overlap join the analysis as a cooperating agency.

Significant individual CWA 404 permits can trigger a NEPA review. However, where the project is already undergoing a NEPA review, the question becomes when the NEPA is triggered for CWA 404 permit. USFS is taking the position that mitigation of disturbed wetlands cannot be presently determined and that issue will be addressed in the CWA 404 permitting process. FEIS Volume 2 at p. 118. USFS essentially postpones a complete analysis of the wetlands mitigation associated with the connected action until the CWA 404 permit issuance. The issue of the timing of the NEPA review in a dual NEPA/CWA 404 permitting action is complicated and is described further in the attached memo entitled "Beyond Section 404: Corps Permitting and the National Environmental Policy Act (NEPA)." At a minimum, the Army Corps will likely have to undergo a NEPA process if it issues an Individual Permit and may be required to supplement this FEIS. This analysis should be completed in this NEPA process in order to guide this decision. The FEIS/Draft ROD is deficient for failing to adequately assess the needed mitigation for effects to wetlands from the connected action.

The FEIS states that groundwater and surface flows to wetlands could be significantly disrupted by the proposed Moderate and Maximum Development Concepts under both of the Action Alternatives[16]. These projected effects to groundwater and wetlands violate the Rio Grande National Forest's Forestwide Standards and Guidelines for Riparian Areas[17] as well as the guidance provided in the Watershed Conservation Practices Handbook (WCPH)[18].

The Forest Service considers the Land Exchange Alternative "beneficial" due to the effect of preserving wetlands. However, these preserved wetlands may become threatened or lost through degradation and dewatering as a result of the adjacent Moderate or Maximum Density Development Concepts. How could facilitating the siting of a large-scale development located next to the wetlands in question be considered necessary for their preservation?

In addition, considerable mention is made in the FEIS of the mitigation measures that would be required as a result of dewatering wetlands. If mitigation is required in the form of wetland reconstruction, would there be potential mitigation areas available for reconstructing a wetland on-site? It is not clear whether all potential mitigation sites would be occupied by development structures. If so, it should have been stated in the FEIS that wetland mitigation would take place

[16] See DEIS Section 2.6.2.2 (*Groundwater*).
[17] See Forestwide Standards and Guidelines for Riparian Areas, Chapter 3, page III-7: "*Standard 4. Do not degrade ground cover, soil structure, water budgets, or flow patterns in wetlands.*"
[18] See Watershed Conservation Practices Handbook (WCPH), FSH 2509.25. Section 12.4.

off-site. This would result in an irretrievable loss of a resource to the project area that was not analyzed in the FEIS.

The Forest Service considers fens an irretrievable and irreplaceable resource[19]. If the placement of buildings, roads, etc, were to adversely impact these valuable wetlands, there is no mitigation for the loss of such a resource. Thus any loss of fens must be prevented. Though the Forest Service may have convinced itself that granting the proposed land exchange is a path towards increased preservation of the fen wetlands on Wolf Creek Pass because they would be added to Forest Service holdings, in reality granting the land exchange and then contending with the highly likely development that would result could threaten the wetlands more than simply allowing them to remain in the hands of the LMJV or another private property owner. What good to the public, to the Rio Grande National Forest's management objectives, or to the planet is a net gain in wetlands under Federal control if those same wetlands end up degraded to the point of severe degradation or non-function as a result of the land exchange that gets them into federal control in the first place?

The FEIS quantitatively estimates the wetland acreage that will be lost from direct flow disruptions and construction, but does not quantify the effects of the much larger threat of changes to groundwater hydrology from Village development. The result is likely a gross misrepresentation of the wetland and fen acreage that will be lost to this project.

The science, which is laid out in our comments from 2012 and is confirmed by the FEIS description of fens, clearly indicates that continuous groundwater saturation is essential for fens. The FEIS, however, fails to analyze the impact of the Village options on the groundwater as it is related to fens, even though it admits that the maximum density development would have the potential to disrupt groundwater flow to the Central Alberta Park wetlands. FEIS at 4-90. In fact, when looking at the impact of impervious surfaces and building foundations on wetland hydrology, the FS admits that "it is difficult to estimate the degree of this potential impact from the core development area because groundwater investigations have not been conducted in this portion of the Analysis Area." *Id*. As far as we can tell no effort was made to rectify this lack of data, so there is no quantitative estimate of impacts to fens and other wetlands.

12. The Action Alternatives Would Lead to a Loss of Canada Lynx Habitat and Reduced Functioning of an Important Canada Lynx Linkage

[19] See USFS, 2002(letter from the R2 Regional Office to Forest Supervisors). See also Watershed Conservation Practices Handbook (WCPH), section 12.4, Management Measure 6, design criterion e.

Objectors discussed issues regarding conservation of lynx on pp 22-26 of our DEIS comments. We did not comment on the proposed Lynx Conservation Strategy, as it did not exist at the time the DEIS was available for comment. Because this issue has arisen since the last official comment period, qualified parties are allowed to object on this issue. See 36 CFR 218.8(c).

a. The Proposed Decision Would Not Protect Lynx and thus Not Comply with the Endangered Species Act or Forest Service Policy

The proposed land exchange would enable a potentially large commercial real estate development. Such a development could have strongly adverse impacts to lynx, which is listed as threatened under the Endangered Species Act (ESA).

Under the ESA, Federal agencies have an affirmative duty to protect and help recover listed species, including lynx. 16 U.S.C. 1536(a)(1). The proposed decision for the land exchange would not only fail to protect lynx, but would reduce this species' chance of recovery to a full viable population. Approval of the land exchange could lead to increased traffic and habitat fragmentation, which would constitute "take"[20], which is expressly prohibited by the ESA. 16 U.S.C. 1538(a)(1)(B). The Biological Opinion issued by the U.S. Fish and Wildlife Service finds that this action "[m]ay affect, is likely to adversely affect" the Canada lynx.

The Forest Service believes it does not have authority to propose or enforce mitigation measures on the federal parcel proposed to be traded to private interests. See, e. g., Volume II of the FEIS ("II FEIS") at 13. That is not true, as shown below:

> *Reservations or restrictions in the public interest.* In any exchange, the authorized officer shall reserve such rights or retain such interests as are needed to protect the public interest or shall otherwise restrict the use of Federal lands to be exchanged, as appropriate. The use or development of lands conveyed out of Federal ownership are subject to any restrictions imposed by the conveyance documents and all laws, regulations, and zoning authorities of State and local governing bodies.

36 CFR 254.3(h).

[20] Under the ESA "The term ''take'' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U. S. C 1532 (19).

However, if the agency does not wish to condition development on the federal parcel to be traded to private, it must still ensure that lynx habitat is not degraded or destroyed to the point that take increases and that the functioning of an important linkage is not degraded. This has clearly not been done, as is demonstrated below.

Forest Service Manual 2602 mandates that the agency:

> Maintain ecosystem diversity and productivity by:
>
> a. Recovering threatened or endangered species
>
> b. maintaining at least viable populations of all native and desired non-native wildlife, fish, and plants in habitats distributed throughout their geographic range on NFS lands.
>
> c. Producing habitat capability levels to meet sustained yield objectives relative to demand for featured management indicator species identified in RPA and forest Plans

Forest Service Manual 2670.21 mandates that the agency:

> Manage NFS habitats and activities for threatened and endangered species to achieve recovery objectives so that special protection measures provided under the ESA are no longer necessary.

The Forest Service is violating both Sections 2602 and 2670.21 through its current decision. Violation of Forest Service Manual renders this decision arbitrary, capricious and contrary to guiding agency law.

b. The Proposed Decision Would Lead to Degradation of the Wolf Creek Pass Lynx Linkage

i. <u>Linkages are very important for lynx protection and recovery.</u>

Connections between areas of high quality habitat across the landscape are very important for ensuring that lynx can maintain and recover their population in the Southern Rockies Ecosystem. As the FEIS notes,

> Because of the patchy, discontinuous distribution of lynx habitat in the Southern Rockies Ecosystem, maintaining landscape-level habitat connectivity may be paramount to maintaining a viable population.

FEIS at 3-70, BA at 52.

Generally, "[t]he goal of linkage areas is to ensure population viability through population connectivity". FEIS at 3-71. Thus all lynx linkages are important, but the one in the project area may be the most important one in the Southern Rockies, as is discussed below.

ii. The Wolf Creek Pass Lynx Linkage (WCPLL) is very important for recovery of lynx population in the Southern Rockies.

In a report on wildlife habitat linkages and fragmentation, SREP, 2005 rated Wolf Creek Pass as a very high priority linkage. See id. at 120, 123.

The WCPLL connects two areas of high quality habitat, and thus is very important for recovery of lynx to a full, viable population. The project area is situated between two breeding areas:

> Within the [San Juan Core Area], the Village at Wolf Creek project area is located between two of the principal lynx breeding complexes, Platoro, to the south, and Rio Grande Reservoir, to the north.

BA at 39.

The FEIS notes the heavy use and importance of the WCPLL:

> Lynx are heavily using the WCPLL area as a dispersal corridor and the viability of this linkage is important to the recovery of lynx in Colorado. The linkage spans a forested swath over the Continental Divide between large blocks of highly effective subalpine habitat. Lynx denning and established home ranges have been identified to the north and south of the WCPLL. The linkage is part of the CDOW's "Core Research Area" in the San Juan Mountains, recognized as the largest continuous block of high quality lynx habitat in the state and where the CDOW focused their 10-year lynx monitoring and research efforts.[21] This core area (defined as New Mexico north to Gunnison, west to

[21] The FEIS further states that

> The [San Juan Core Area] is considered to be some of the best lynx habitat in the state because of large, contiguous, subalpine and montane habitat blocks supporting relatively high snowshoe hare densities, permeated by few highways, and supporting a relatively low human population density.

> Taylor Mesa, and east to Monarch Pass) is where all 218 [reintroduced] lynx were released. …
>
> The WCPLL was designated expressly because (1) this portion of the Continental Divide is known to be important for lynx (and multiple wildlife species) movements, (2) one lynx mortality has occurred along the highway (at Pass Creek on the east side of the pass in 2000), and (3) because of concern that the 2-3 lane, high speed Hwy 160 is presently impairing lynx movements.

FEIS at 3-71, 3-72; emphasis added.

The Biological Assessment (BA) states that "The viability of [WCPLL] is important to the recovery and continued viability of lynx in Colorado". Id. at 58, citations omitted.

iii. <u>The WCPLL is already impaired, and the proposed decision would greatly exacerbate this impairment</u>.

Current annual average daily traffic (AADT)[22] on U. S. Highway 160 over Wolf Creek Pass is about 3200. This is well within the range of daily traffic known to impair lynx movement, though short of that which would be a "more serious threats to mortality and habitat fragmentation". BA at 65.

Even with no construction of the proposed Village at Wolf Creek, traffic is expected to increase to a level above the 4000 AADT that is known to seriously impair lynx movement. BA at 65, 66.

However, with implementation of the proposed action, i. e., completion of the land exchange and construction of Wolf Creek Village, the resulting AADT could be far above this 4000 level. Under the moderate density development scenario for the Village, AADT is projected to be 5538 in 2043. For the maximum density development, AADT would be 8334 in that year. BA at 85. The maximum density scenario's contribution of 5480 AADT represents a significant contribution just in and of itself. Id. at 87. This "would be additive to traffic volumes within the range of those documented to impair lynx movements and… pose more serious threats to

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Id. at 3-72.

[22] AADT is defined as "the annual average two-way daily traffic volume. AADT represents the total traffic on a section of roadway for the year, divided by 365. It includes both weekday and weekend traffic volumes" BA at 64.

mortality and habitat fragmentation". Ibid., citations omitted. Colorado Parks and Wildlife commented that "[w]e believe the proposed Village at Wolf Creek and attendant increase in traffic on Hwy 160 may be problematic for lynx recovery efforts in Colorado." *CPW DEIS Comments.*

CPW further states that:

> Highway 160 bisects two of the principal lynx breeding complexes, Platoro to the south and Rio Grande Reservoir to the north. In order to promote interchange between these areas and provide for genetic diversity and augmentation to other areas, lynx must cross the highway exposing them to an increased risk as traffic levels increase. *Id.*

The additional traffic "could impair the continued recovery of lynx in Colorado as a result of fewer animals contributing to the population". BA at 89. That could occur via additional mortality during attempted crossings, and/or because lynx may attempt fewer crossings with the very high traffic volume, or even stop trying to cross the highway at all. Either way, the effectiveness of the WCPLL would be greatly reduced, or in the extreme, severed altogether.

iv. <u>The proposed decision would violate standards, guidelines and objectives for lynx conservation</u>.

The Southern Rockies Lynx Amendment (SRLA[23]) contains numerous measures for lynx conservation, some of which apply to the project at hand. Since the SRLA amended forest plans, including that for the Rio Grande National Forest (SRLA Record of Decision at 1), the Forest Service must comply with its provisions. See National Forest Management Act, 16 U. S. C. 1604(i), which states that all activities on national forest lands "shall be consistent with the land management plans".

The following two provisions of SRLA require maintenance of connectivity of lynx habitat:

> Objective ALL O1:
> Maintain or restore lynx habitat connectivity in and between LAUs, and in linkage areas.

[23] The official name of this document is "Southern Rockies Lynx Management Direction", but we use the more common name in this objection.

Standard ALL S1:
New or expanded permanent developments and vegetation management projects must maintain habitat connectivity in an LAU and/or linkage area.

SRLA ROD at Attachment 1-1.

Obviously, from the projected traffic increase alone (discussed above), the proposed development, which the proposed Forest Service land exchange would make possible, would not maintain connectivity of lynx habitat. Rather, it would degrade existing connectivity, both across Highway 160 and within the Trout-Handkerchief LAU. The likely increase in mortality would constitute "take" under the ESA. BA at 89.

The Forest Service attempts to argue that these SRLA provisions would be met, at least in part because the land exchange itself would not change lynx habitat, and the subsequent development of the lands in the project area would not be under the agency's control, thus SRLA would not apply. See BA at 94, 96. However, without the proposed land exchange, the proposed development would not be possible, as the BA admits in the same paragraphs![24] Therefore, SRLA applies to the proposed land exchange, and said action and all connected actions (such as Village development) must be in compliance with SRLA.

Even after acknowledging that "traffic contributions to Hwy 160 under the Moderate and Maximum Density Development Concepts would increase appreciably above the environmental baseline traffic levels that impair lynx movements and pose more serious threats to mortality and habitat fragmentation [and] they would by themselves present a moderate risk factor to lynx", the FS concludes that the project will still "maintain habitat connectivity." The FS partially justifies this conclusion by crafting new and unique definitions for "maintain" and "habitat connectivity." The FS explains that:

Maintain – In the context of this decision, maintain means to provide enough lynx habitat to conserve lynx. It does not mean to keep the status quo.

And,

Habitat connectivity (lynx) – Cover (vegetation) in sufficient quantity and arrangement to allow for the movement of lynx. Narrow forested mountain ridges or shrub-steppe plateaus may

[24] "…the land exchange would grant year-round access to the private parcel (that does not exist currently) that would allow for development that would not occur otherwise". Ibid.

serve as a link between more extensive areas of lynx habitat; wooded riparian communities may provide cover across open valley floors. (LCAS) FEIS at 4-115.

The SRLA did not contemplate a conservation regime where decision would result in just "enough lynx habitat to conserve lynx" or reliance on "narrow forested mountain ridges" to link more extensive areas of lynx habitat. The SRLA was not meant to be applied in the "context of" individual decisions; it was supposed to apply across the forest to ensure conservation of lynx. The new definitions crafted for this decision would allow the Forest Service to whittle down lynx habitat until the agency believes there is just "enough".

This application and definition of ALL S1 is contrary to past applications within the Region 2 Forest. When Vail Resorts was analyzing an expansion of Breckenridge Ski Area onto Peak 6, the EIS determined that although "habitat connectivity is not maintained under current conditions" the action would not be consistent with Standard ALL S1. The Forest Service went through the process of amending the Forest Plan to eliminate the applicability of Standard All S1. Amending the Forest Plan was the honest way to assess habitat connectivity as compared to creatively defining terms to conclude that the Southern Rockies Lynx Amendment's protections do not apply.

As Colorado Parks and Wildlife points out in their DEIS Comments,

> [D]ispersed winter recreation from cross-country skiing, snowshoeing and snowmobiling into lynx hunting areas and travel corridors, which could result in either direct movement out of the area by lynx, direct mortality from illegal take, or disruption of lynx hunting activities, all of which could result in lower productivity of lynx in the general area. *CPW DEIS Comments.*

Forest Service's Wildlife Biologist reviewed the Biological Assessment for the Wolf Creek Access Project and concluded "It seems clear that this project does <u>not</u> meet ALL S1, and I don't think adjusting the alternative would change that." Exh. 27 (*FW_ FW_ Wolf Creek BA)* (<u>emphasis in original</u>). Further, Wildlife Biologist Rick Thompson, a member of the Consultant Team felt "either Alternative would be inconsistent with Standard ALL S1, requiring a Forest Plan amendment for either Alternative." Exh. 14 (*FW_ WCV FP Amendment Question Revisited).* This sentiment was echoed in an email dated October 30, 2012, from Consultant Team member, David Johnson, an ecologist who found "the Proposed Action…to be inconsistent with this standard. Therefore, in order to comply with NEPA and avoid a fatal flaw, the Forest Service believes that this current conclusion must be disclosed to the public and the public must be

provided the opportunity to comment on the decision to amend the Forest Plan." Exh. 28 (*FW_ Wolf Creek DEIS).*

However, the Forest Service decided that "the Proponent's commitment to implement the conservation measures (Appendix B) recommended by the Technical Panel under all density development concepts should be adequate to maintain habitat connectivity across Highway 160 and minimize vehicle-related lynx mortality along Highway 160…" FEIS 4-115. A review of "Appendix B" makes clear that the Forest Service is relying on possible and unknown protective measures (See Section 12d below). The "Conservation Strategy" even admits that "it is uncertain exactly what the recommendations of the Technical Panel will be to minimize the various sources of take." FEIS V2 P. 16. The Forest Service further assures the public that "[o]ther measures to maintain habitat connectivity across Highway 160 and minimize vehicle-related lynx mortality, generally focusing on changing motorist behavior" FEIS V2 P. 17.

To think that asking motorists to drive slower and avoid hitting lynx is going to result in less take is absurd. It's not as if motorists are intentionally creating road kill. The "Additional Measures" listed in the Conservation Agreement are equally impractical. What is missing from the FEIS is adequate analysis of the likelihood that these conservation measures, which were used to justify the inapplicability of Lynx Standard ALL S1, will actually help maintain connectivity – as compared to the potential 70% increase in traffic on Highway 160. *FEIS 4-117.* The failure to acknowledge that this decision violates Standard ALL S1 is highlighted by the Forest Services' experts, the obvious impacts of development and associated traffic, and even from statements in the FEIS such as "Moderate and Maximum Density Development Concepts would result in greater lynx avoidance of the highway corridor, impairing some local and dispersing movements that may lead to reduced landscape connectivity within the designated WCPLL." FEIS 4-118.

The proposed lynx conservation measures would not ensure connectivity, as is discussed below in section D. Thus the proposed decision does not comply with the SRLA and cannot be approved.

c. The Proposed Decision would Cause Permanent Loss of Lynx Habitat

When it comes to lynx habitat, the proposed parcels for the exchange are not close to equal value. The majority (85.6 percent) of the proposed federal exchange parcel is mature, closed-canopy spruce-fir forest, which is good lynx habitat. BA at 32. The southern half of the proposed private parcel has already been "partially developed for downhill ski terrain" (ibid.), thus it has

little value or effectiveness for lynx. The difference between these parcels is depicted in BA Figure 4-1, Vegetation Type Map.

There would be a net loss of 138.9 acres of closed canopy spruce-fir forest under proposed selected alternative 2. BA at 77. This loss is considered adverse because lynx habitat would be transferred to an entity that is much less likely to protect the habitat, and because the land in question is in a linkage. Ibid. The loss would be permanent, as development for human use would occur, and lynx habitat is not ever likely to be restored and these lands.

Horizontal cover of at least 35 percent is considered important for snowshoe hare, the lynx' favorite prey. The federal parcel has considerably better cover than does the private parcel. The BA concludes that there is an 80 percent probability of the federal parcel, in its entirety, providing "effective snowshoe hare summer foraging habitat", and an 80 percent probability that the private parcel, in its entirety, would not support adequate hare cover. BA at 62-63. For winter, there is an 80 percent probability that both the federal and private parcels would support adequate hare cover; however, the effectiveness of habitat on the private parcel is likely impaired by disturbances associated with downhill skiing. Id. at 63, 78.

The overstory Englemann spruce trees in the project area are being attacked and killed by spruce bark beetle. However, this does not necessarily mean the loss or degradation of lynx habitat Supplemental Biological Assessment, August, 2013, at 11-12. Dead overstory trees still provide some cover and "other" (than foraging or denning) habitat. The understory would remain and function as the same as it did before the spruce mortality. When the dead trees fall to the ground, they may form denning habitat.

Note that "[n]o conservation measures have been agreed upon…to offset this direct loss of primary vegetation (lynx habitat) from NFS lands". BA at 96. Indeed, the Lynx Conservation Strategy contains no measures to offset or mitigate this habitat loss. See II FEIS, Appendix B.

The loss of habitat via the exchange would violate two provisions in the section of the SRLA addressing linkages:

Objective LINK O1 states:

> In areas of intermingled land ownership, work with landowners to pursue conservation easements, habitat conservation plans, land exchanges, or other solutions to reduce the potential of adverse impacts on lynx and lynx habitat.

Guideline LINK G1 states:

> National Forest System lands should be retained in public ownership.

SRLA at Attachment 1-8.

Rick Thompson, Wildlife Biologist for Western Ecosystems who is listed in the FEIS as a member of the "Consultant Team", acknowledged that "I tentatively find Alternative 2's direct effects to be inconsistent with SRLMD (2009) Objective LINK 01. Exh. 29 - *FW_ Draft WCV BA.*

The proposed exchange, which would enable the construction and operation of a large scale housing and retail development, also would violate direction from the Interagency Lynx Biology Team, 2013:

> Retain lynx habitat and linkage areas in public ownership and acquire land to secure linkage areas where needed and possible. On private lands in proximity to federal lands, agencies should strive to work with landowners to develop conservation easements, explore potential for land exchanges or acquisitions, or identify other opportunities to maintain or facilitate lynx movement.
>
> Minimize large-scale developments that would substantially increase habitat fragmentation, reduce snowshoe hare populations, or introduce new sources of mortality.

Id. at 93. Note that the proposed land exchange would not <u>facilitate</u> lynx movement, but would instead <u>degrade</u> it. Thus Objective Link O1, Guideline Link G1, and the direction quoted above from the Interagency Lynx Biology Team would not be followed if the land exchange is approved. As the BA states:

> the concept of a land exchange that would facilitate [adverse] effects and actually increase the potential of adverse impacts on lynx and lynx habitat within a designated lynx linkage is antithetical to [] objective [Link O1].

Id. at 99.

<u>d. The Proposed Conservation Measures Would Not be Effective in Reducing Impacts to Lynx nor Promoting Recovery to a Full, Viable Population</u>

The BA repeatedly asserts that application of conservation measures will minimize, eliminate, or mitigate impacts to lynx, including the threat to maintaining connectivity across Highway 160. See, e.g., BA at 95, 96, 97. However, the application, let alone the success, of such measures are questionable at best.

i. <u>The Lynx Conservation Strategy was developed without any public involvement, in violation of NEPA</u>.

The FEIS states that the Lynx Conservation Strategy was taken verbatim from a document entitled "Leavell-McCombs Joint Venture Proposed Applicant-Committed Measures for Canada Lynx Conservation for the Village at Wolf Creek," ca. February 21, 2013, that is contained in the project file. FEIS Vol. II at 13. Further, these conservation measures were analyzed in the November 15, 2013 Biological Opinion drafted by the U.S. Fish and Wildlife Service pursuant to Section 7 of the Endangered Species Act. This Biological Opinion is referenced throughout the FEIS, the document itself was not incorporated into the FEIS. Although heavily relied on in this decision making process, the BO is not even posted in the "Administrative Record" for this decision.

Further, the BO, which contains in depth analysis of the lynx impacts of this decision was prepared after the Draft EIS comment period was closed. The public never had the opportunity to review and comment on this part of the NEPA analysis. USFS' failure to engage in ESA consultation and obtain a biological opinion from FWS prior to circulation of the DEIS inhibits the public's ability to effectively comment on the DEIS. The USFS should re-circulate the DEIS for additional public comment after it engaged in ESA consultation with FWS and the public can then be informed what the Decision and subsequent development's actual impacts to threatened and endangered species will be in the view of the expert agency charged with protecting those species. At present, the public has been provided with only half the story – the potentially prejudiced or understated opinion of what the project proponent and its hired consultants think about the Project's impacts on threatened and endangered species.

NEPA demands agency transparency in its decision-making through public involvement. *Baltimore Gas & Electric v. NRDC*, 462 U.S. 87, 97 (1983); *Kern v. BLM*, 284 F.3d 1062, 1073 (9th Cir. 2002). "By focusing both agency and public attention on the environmental effects of proposed actions, NEPA facilitates informed decision-making by agencies and allows the political process to check those decisions." *New Mexico v. BLM*, 565 F.3d 683, 703 (10th Cir. 2009). "An agency, when preparing an EA, must provide the public with sufficient environmental information, considered in the totality of the circumstances, to permit the

members of the public to weigh in with their views and thus inform the agency decision-making process." *Bering Strait Citizens for Responsible Resource Development v. U.S. Army Corps of Engineers*, 524 F.3d 938, 953 (9th Cir. 2008). NEPA's procedural safeguards instruct that (1) environmental information be made available to the public before decisions are made and before action is taken, and (2) direct that this information be of "high quality," meaning that it "must concentrate on the issues that are truly significant to the action in question." 40 C.F.R. § 1500.1(b). The potential impacts to threatened and endangered species are among the most serious impacts posed by the Village at Wolf Creek. Accordingly, they are "significant to the action in question." Additionally, FWS' expert opinion on the actual manner and extent of these impacts (as opposed to Forest Service's consultant's opinion) represents "high quality" information.

The FWS' biological opinion was missing from the DEIS and is again absent from the FEIS and has not been made readily available to the public. Accordingly, to allow the public to comment effectively on the DEIS and Object to the FEIS before decisions are finalized and before action is taken, USFS must re-circulate the DEIS for additional public comment when the "high quality" information provided by the ESA Section 7 consultation process is available.

Finally, it is important to note that the NEPA process provides the public with its only opportunity to review the ESA Section 7 consultation process via public comment because unlike the NEPA process, the ESA Section 7 consultation process itself is "private" between USFS and FWS and will not involve public comment. The public's only opportunity to "weigh in" on the impacts to threatened and endangered species via public comment occurs during the NEPA process – rendering the USFS' compliance with NEPA that much more critical in this instance as otherwise the public will not be afforded an opportunity to review and comment on FWS' position as to the Project's impacts on threatened and endangered species. See *New Mexico*, 565 F.3d at 704 (highlighting the importance of "informed public comment") and *Id*. at 708 (holding inadequate public comment is not harmless).

ii. <u>Application of any conservation measures is at best uncertain</u>.

Under the proposed Strategy, the project proponent would commit to funding for a technical panel that would

> make recommendations for actions that need to be taken to provide safe passage across the Highway 160 in general, as well as the actions that will appropriately minimize take from the Village.

II FEIS at 13-14.

With the precise measures, and even the likelihood of applying any measures, unknown, it is at best premature to state that such measures, if they ever are applied, would be sufficient to reduce impacts to, and minimize take of lynx.

The Forest Service believes it will have no jurisdiction, i. e., no authority to impose mitigation measures, once the land exchange is implemented. *Id*. at 13. Therefore, it absolutely must not approve of any land exchange that would not ensure conservation of lynx and its habitat after subsequent development. As is very clear, the proposed land exchange would allow construction of a large commercial real estate development that would have major adverse impacts to lynx, including take. Thus the land exchange could only be approved if sufficient mitigation was applied to reduce the take to very near zero.

However, there is no assurance that any measures would be applied, let alone that they would reduce the impacts or take. (On the latter, see further discussion in subsection 3 below.) What if the technical panel members cannot agree on the measures that should be applied? Note also that the funding that the applicant has agreed to provide might not even be enough to implement conservation measures for the low density development, and it is unlikely that the Village would only be developed to the low density level. *Id*. at 17.

When a proposed action will result in impacts to resources, the Agency is obligated to describe what mitigating efforts it could pursue to off-set the damages that would result from the proposed action. *See* 40 C.F.C. § 1502.16(h) (2009) (stating that an EIS "shall include discussions of . . . [m]eans to mitigate adverse environmental impacts"). "Mitigation must 'be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated." *Carmel-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1154 (9th Cir. 1997). (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989)). The Ninth Circuit explained that fair evaluation requires agencies to "analyze[] the mitigation measures in detail [and] explain how effective the measures would be. A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA." *Nw. Indian Cemetery Protective Ass'n v. Peterson*, 764 F.2d 581, 588 (9th Cir. 1985), *rev'd on other grounds*, 485 U.S. 439 (1988).

In *Neighbors of Cuddy Mountain*, the court found that while the U.S. Forest Service ("USFS") had acknowledged that a proposed timber sale would negatively impact the redband trout by increasing sedimentation levels, the EIS prepared by the USFS did not identify which (or whether) mitigation measures might decrease sedimentation in the creeks affected by the sale. *Id.* Further, the court noted that "it is also not clear whether any mitigating measures would in

fact be adopted. Nor has the Forest Service provided an estimate of how effective the mitigation measures would be if adopted, or given a reasoned explanation as to why such an estimate is not possible." *Id.* Further, the court found that "[t]he Forest Service's broad generalizations and vague references to mitigation measures . . . do not constitute the detail as to mitigation measures that would be undertaken, and their effectiveness, that the Forest Service is required to provide." *Id.*

The success of any real estate development (should the land exchange and any subsequent County permits be granted) is uncertain, due to the difficulty of attracting interest in an area that is under snow up to eight months per year, and is heavily infested with mosquitos much of the remainder of the year. If the Village suffers financial difficulty, sufficient funding for lynx conservation may not be available. But the Village would still have been constructed, resulting in: a permanent loss of lynx habitat, habitat fragmentation on the landscape, and a loss of effectiveness of the WCPLL.

But even with this doubt about funding,

> it is assumed that adequate funding will be available to implement the conservation measures recommended by the technical panel, consistent with the conservation measures described in the Proposed Action.

II FEIS at 17. With many unknowns, this conclusion is not warranted.

Furthermore, as long as some measures are implemented, even without now knowing what they might be or how effective they would be, the Fish and Wildlife Service will exempt the applicant from incidental take (section 10 of the ESA). Id. at 16. This would be true even though there will be "take" from additional traffic generated by the Village (BO at 34-35), and "it is uncertain exactly what the recommendations of the Technical Panel will be to minimize the various sources of take". *Id*. at 16. Also: "the [lynx conservation] strategy does not necessarily implement measures to minimize take prior to initiation of development activities". BO at 35.

Given the uncertainty of what measures would be implemented, how effective they would be (see subsection iii below), and whether sufficient funding would be available for their implementation, exemption of the requirements of ESA section 10 with regard to incidental take is illegal. See 16 U. S. C. 1539(a)(2)(a) and (B). Note also that before a decision on incidental take is made, there must be an "opportunity for public comment, with respect to a permit application and the related conservation plan". 16 U. S. C. 1539(a)(2)(B). As discussed

above, there has been NO public involvement in development or preliminary approval of the Lynx Conservation Strategy, let alone of a permit for incidental take.

The Forest Service is not responsible for decisions regarding incidental take of ESA-listed species. However, it does have the responsibility of not approving any project or activity that would reduce habitat and/or increase take for a listed species.

Granted, a final configuration of the Village, should the land exchange ultimately be approved, is not known at this time. However, that does not absolve the Forest Service of its responsibility to ensure that connectivity of lynx habitat is maintained and that lynx would still have an opportunity to recover to a full, viable population. That simply will not happen if the land exchange is implemented as currently proposed and the Village is constructed at the moderate or higher density development level.

iii. <u>If the Village is constructed, the effectiveness of measures in reducing impacts to lynx and minimizing take is uncertain</u>.

For at least the maximum density development, it is hard to imagine that any measures could compensate for the loss of connectivity and damage to the linkage from the traffic increase that would occur as a result of the Village. As we discussed above in section B 3, the effectiveness of the linkage is already impaired due to traffic, and the increase in traffic from development and operation of the Village for the moderate and maximum development concepts would make it far worse.

There are only so many places that lynx can cross Highway 160. There are areas with topographical barriers that either prohibit crossing or force lynx to travel parallel to the highway for some distance to get around them, increasing their susceptibility to death from collisions with vehicles. BA at 59. Connectivity is already reduced by various obstacles. (See BA Table 6-3, ibid.) These obstacles include “extensive highway cuts, extensive highway fill slopes, and natural landform constraints”. *Id*. at 57.

This already impaired connectivity would get considerably worse if the Village is constructed, as the additional traffic would make lynx highway crossing even more treacherous, as is discussed above. Under the maximum density development, an area 5963 feet long of impaired

connectivity would be created, which would likely deflect north-south movements by lynx. BA at 81.[25]

The Biological Opinion states that the effectiveness of conservation measures "depend[s] on the specific measure[s] implemented and when implementation occurs". FWS, 2013, at 30.

The BA (p. 87) and Lynx Conservation Strategy (II FEIS at 17) state that the effectiveness of highway crossing structures is generally high. However, it is questionable whether such structures would be effective across Highway 160. Even if the structures were themselves likely to be effective in allowing animals to get across the highway, it is possible that, with the Village constructed and the concomitant habitat destruction and fragmentation, lynx would not be able to get to them. Indeed, FWS, 2013 states that monitoring has not shown that lynx use existing crossing structures on Highway 160. Id. at 16.

The crossings might also attract lynx predators, such as coyotes and bobcats. If so, lynx would be harmed by attempting to use the crossing structures.

The application and possible effectiveness of future conservation measures in reducing impacts to lynx and minimizing take are at best uncertain at this time. The Forest Service thus cannot rely on the possibility of implementation of measures in the future that could be effective (but probably won't be) to now conclude that such measures will minimize impacts and take.

The land exchange would enable development of a major commercial real estate project. Construction of at least the maximum density development, and maybe also the moderate density one, would further impair connectivity of lynx habitat. This would violate the requirements in the SRLA to maintain connectivity in LAUs and linkages. The additional mortality from collisions with vehicles on Highway 160 would constitute take, which is prohibited by ESA. The land exchange, which would increase adverse impacts to lynx, would violate provisions of SRLA designed to reduce or minimize such impacts in linkages.

Thus the proposed development cannot be allowed, and at least the currently proposed land exchange, which would enable this development, must be denied.

13. The Action Alternatives Would Harm Other Wildlife

[25] FWS, 2013, believes that the fragmentation of the linkage due to Village development will extend 9000 feet. Id. at 25

Objectors raised this issue on page 26 of our DEIS comments.

By limiting the scope of the NEPA analysis, the proposed developments' direct and indirect impacts on wildlife was excluded from detailed analysis in the FEIS. Instead of analysis, the FEIS summarized the work of consultants involved with eliminating the NEPA analysis of direct impacts from the development proposal. FEIS at 3-65 (FEIS "discussion related to wildlife is a summary of the information contained in the Biological Assessment (Thompson et al., 2013) and Biological Evaluation and Specialists Report (Powell and Thompson, 2013) that were prepared in support of this analysis. For more information on the summary presented below, the reader is referred to the project file."). Accordingly, the scope of the analysis was unlawfully limited to "the area that includes the Federal exchange parcel, the non-Federal exchange parcel, that part of the private land parcel not exchanged, as well as the road access corridors (see Figures 2.2-1, 2.2-2 and 2.2-4)." FEIS at 3-65.

As stated in the comments, both Action Alternatives would impair habitat and cause disturbance for a variety of other rare and sensitive wildlife species beyond the property boundaries involved in the land trade. These deficiencies remain in the FEIS, which lacks NEPA-compliant analysis of impacts to pine marten, boreal owl, brown creeper, Wilson's warbler, hermit thrush, Lincoln's sparrow, and olive-sided flycatcher, each of which is globally rare and/or sensitive species observed in or near the project area and could be negatively affected by the construction and operation of the Village at Wolf Creek. Construction and operation would also directly impact the Rio Grande cutthroat trout, through dewatering/alteration of local hydrology and by contamination of the headwaters of the Rio Grande River. Rare wetland plant species will be negatively impacted by this development. As outlined below the federally listed yellow billed cuckoo will be harmed by water depletion resulting from the Village at Wolf Creek. Impacts to these species must be analyzed in the FEIS.

The deficiencies FEIS are confirmed by Colorado Parks and Wildlife's DEIS Comments, which pointed out that,

> Although the footprint of the development itself appears small in comparison to the whole landscape, its impact to wildlife will likely be much greater than what happens physically on the property. The project will increase the human population on site and in surrounding communities, leading to more vehicular traffic, expanded commercial and residential development, and more recreational pressure on the landscape. CPW feels that this project will likely have significant cumulative impacts that will affect wildlife regardless of the alternative selected.

20121010CL846-CPW, p. 2. By manipulating the scope of the analysis, the Forest Service has violated NEPA and the public and decision makers will not be made aware of the true impact on wildlife. A new NEPA process is required that reveals the impacts beyond the footprint approach taken by the FEIS.

14. The Action Alternatives Would Reduce Water Quality

Objectors commented on water quality issues in their DEIS Comments at pages 20 – 21, and 27 – 28.

a. Streams

Objectors commented on this issue on pages 20 – 22 of their DEIS Comments. Also, EPA commented on the DEIS that existing water quality standards for chlorine were being violated in North and South Pass Creeks. *EPA DEIS Comment Letter, p. 3.* Both of these creeks are classified as Aquatic Life Cold 1 with an acute chlorine standard of .019 mg/l and a chronic standard of .011. See FEIS at 3-7. The FEIS published water quality data from sampling events in 2011 showing several results exceeding both the acute and chronic standards. I FEIS at 3-7; II FEIS at Appendix C. Sampling at various times found exceedances of the following pollutants at various points: lead, arsenic, iron, cadmium, chlorine, and coliform.

Notably in June, "Cadmium and Lead were found to exceed the stream standards in [] four [of eight sampling] locations". I FEIS at 3-7. June is a high flow month, as it includes the end of the annual snowmelt, or a good deal of it in years with high snowfall and/or a cool spring. An exceedance in a high flow month should be investigated, as a high flow would normally dilute pollutant concentrations.

The FEIS contains no analysis of how these pollutants, other than chlorine and coliform, would be affected by the proposed action. See section 4.1.3.2.3. Only "[wastewater treatment plant - WWTP] type pollutants" are covered in this section (see id. at 4-17.), or anywhere else in the FEIS. In other words, pollution that occurs because of something other than wastewater treatment is not addressed in the FEIS. But it needs to be. Specifically, the FEIS must disclose how existing concentrations of all pollutants that currently exceed Instream Water Quality Standards (ISWQS) would be affected by the proposed Village development.

Chlorine and coliform are pollutants related to a WWTP. Chlorine concentrations in North Pass Creek already spike high in late April and early May every year due to the use of road salts which become entrained in snow storage areas, then melt into the creek. I FEIS at 3-10. This

would continue under the proposed action. I FEIS at 4-18. Total coliform would be very high under the maximum development concept, well in excess of ISWQS. See I FEIS at 4-17, 4-18.

With increased traffic on Highway 160 and a whole new set of roads in the proposed Village, it is reasonable to expect an increase in the use of road salts to increase vehicle traction and increase traffic flow and safety. However, there is no quantitative analysis in the FEIS of how much chlorine concentrations in North Pass Creek might increase from the proposed action.

Although these segments of North and South Pass Creek are not currently on Colorado's 303(d) list of impaired waters, if they are exceeding standards, they should be placed in the 303(d) list during the 2015 listing process.

A related concern is the very high percentage of stream flow that would be sewage effluent under the maximum development concept. See FEIS at 4-17. If ISWQS are already being violated, they would certainly get worse with maximum development of the Village. The Forest Service cannot approve a project or activity that violates the any "Federal, State, interstate, [or] local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution". Section 313 of the Federal Water Pollution Control Act, 33 U. S. C. 1323(a).

b. Wetlands and Groundwater.

The Conclusion that the land transfer will result in a net gain of around 40.4 acres of wetlands and 22.7 acres of fens is unsupported. Any wetlands transferred will be outside of USFS control, and the required Army Corps of Engineers permitting process involving private wetlands will provide no guarantee regarding preservation or mitigation. Anything transferred should be assumed lost, and the impacts of that loss on the adjacent public land need to be evaluated. The water quality of the area will be impaired to an unknown extent. This includes the fact that North Pass Creek will be an effluent-dominated stream during parts of the year, and that some water quality standards will likely be unattainable and require a variance.

The groundwater impacts at the site remain unknown. The most troubling aspect regarding what might happen to the groundwater is that it remains a mystery. Groundwater investigations east of the Alberta Park wetland complex were not done. II FEIS at 102, 103. Information on the flow of groundwater to this area is needed, because Village development could reduce recharge due to construction of impervious surfaces, and could divert or block flow due to building construction. This would likely affect wetlands. See FEIS at 4-90, 4-91 and the section in this objection on wetlands.

Aside from the above listed Objectors' comments, EPA commented on the DEIS that "The FEIS should provide a groundwater investigation for the area east of the Central Alberta Park Wetland Complex." The FEIS responds by stating, "The groundwater investigations conducted to date and as described in Section 3.2 of the FEIS were focused on the Alberta Park Wetland Complex to evaluate potential impacts from development on the wetlands. Groundwater investigations were not conducted in the area east of the Alberta Park Wetland Complex due to the lack of significant wetlands in this area. If groundwater issues are a concern for any potential development resulting from implementation of either of the Action Alternatives, they would be addressed during the Mineral County PUD process. The purpose of the FEIS is to evaluate access alternatives to the private land inholding." II FEIS at 102-103.

Development of the Village at Wolf Creek is an indirect effect of the proposed action that is within the scope of this FEIS. 40 C.F.R. §1508.25(c) and 1508.8(b). EPA raised a legitimate concern that development of the Village at Wolf Creek could adversely impact groundwater in the area east of Central Alberta Park Wetlands Complex. Under the NEPA regulations, the USFS's response to comments should, "Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response." 40 C.F.R. §1503.4(a)(5). USFS's response also fails to adequately explain why it failed to collect the requested information pursuant to 40 C.F.R. § 1502.22 which requires the agency to either collect the information of explain why it is technically impossible or cost prohibitive to collect the information.

c. Alberta Reservoir

Aside from the above listed Objectors comments, EPA commented on the DEIS that Alberta Park Reservoir is hypereutrophic and thus nutrient water quality monitoring should be performed because South Pass Creek, which would run through the Village, goes into the Reservoir. The FEIS fails to perform such monitoring, with the exception of several locations downstream in North and South Pass Creeks. FEIS Appendix C. Monitoring data from Alberta Reservoir should have been included in the FEIS, as well as baseline nutrient monitoring in the area of the proposed Village at Wolf Creek. The only response FS provides to this comment is that the "Village at Wolf Creek will not discharge directly into Alberta Reservoir. II FEIS at 129.

Under the NEPA regulations, the USFS's response to comments should, "Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which

would trigger agency reappraisal or further response." 40 C.F.R. §1503.4(a)(5). USFS also fails to adequately explain why it failed to collect the requested information pursuant to 40 C.F.R. § 1502.22 which requires the agency to either collect the information or explain why it is technically impossible or cost prohibitive to collect the information.

d. Water Quality Monitoring

Aside from the above listed Objectors' comments, EPA commented to the DEIS as follows:

> The FEIS should include a discussion regarding the Forest Service's approach to water quality monitoring of indirect impacts associated with the development of the Village at Wolf Creek and wants to know if thresholds for triggering enhanced mitigation would be considered. In addition, nutrient monitoring (e.g., total phosphates, total nitrogen and sediment) is recommended, and if there are any significant gaps in existing water quality data they should be included in future monitoring plans.

The FEIS responded to this comment by stating:

> Monitoring the water quality impacts of any development resulting from Forest Service approval of either of the Action Alternatives and subsequent Mineral County approval of a PUD is beyond the jurisdiction of the Forest Service. The PUD process with Mineral County will analyze and discuss the impact of the development on water quality based on detailed development plans. Water quality issues of the development would be resolved by the Proponent working with the Colorado Department of Public Health and Environment.

II FEIS at 97.

Development of the Village at Wolf Creek is a connected action and an indirect effect of the proposed action that is within the scope of this FEIS. Draft ROD at p. 22 and 40 C.F.R. §1508.25(c) and 1508.8(b). EPA raised a legitimate concern that development of the Village at Wolf Creek could adversely impact water quality in the area. Under the NEPA regulations, the USFS's response to comments should, "Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response." 40 C.F.R. §1503.4(a)(5). USFS's response also fails to adequately explain why

it failed to collect the requested information pursuant to 40 C.F.R. § 1502.22 which requires the agency to either collect the information or explain why it is technically impossible or cost prohibitive to collect the information.

e. Groundwater Mapping

Aside from the above listed Objectors' comments, EPA commented in the DEIS that "the FEIS should provide a floodplain mapping for North and South Pass Creeks." The FEIS responded to this comment by stating:

> A floodplain mapping of North and South Pass Creeks is beyond the scope of this FEIS because the purpose of the FEIS is to evaluate access alternatives to the non- Federal inholding. It should be noted that the Forest Service does not regulate development on private land. Mineral County's September 24, 1991 Floodplain Ordinance provides development regulations for structures in the 100-year floodplain. Therefore, Mineral County will determine the need for any floodplain mapping during the PUD process for any potential development proposed by the Proponent following Forest Service approval of the Action Alternatives, if they determine such studies are warranted.

II FEIS at 97.

Development of the Village at Wolf Creek is an indirect effect of the proposed action that is within the scope of this FEIS. 40 C.F.R. §1508.25(c) and 1508.8(b). EPA raised a legitimate concern that development of the Village at Wolf Creek could adversely impact the flood plain in North and South Pass Creeks and thus baseline mapping is necessary. Under the NEPA regulations, the USFS's response to comments should, "Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response." 40 C.F.R. §1503.4(a)(5). USFS's response also fails to adequately explain why it failed to collect the requested information pursuant to 40 C.F.R. § 1502.22 which requires the agency to either collect the information or explain why it is technically impossible or cost prohibitive to collect the information.

f. Baseline for Hydrology and Water Quality

Aside from the above listed Objectors' comments, EPA and others have commented that baseline water quality conditions should be established for the small streams that could be

impacted by development of the Village at Wolf Creek. EPA DEIS comment letter. With regard to hydrology, the FEIS states:

> There is no stream flow data for the small streams that would potentially be impacted by development resulting from Forest Service approval of either of the Action Alternatives. Furthermore, there are no stream gauge records for small, nearby streams suitable for extrapolation. Therefore, the Snowmelt Runoff Model (SRM) was used to calculate the average monthly stream flow of North Pass Creek. The Forest Service believes that the SRM data accurately characterizes the hydrology of the project site. See Section 3.1.3.2 of the FEIS. Mineral County will determine the need for any baseline hydrology studies for any potential development proposed by the Proponent during the PUD permitting process.

II FEIS at 99-100.

Development of the Village at Wolf Creek is an indirect effect of the proposed action that is within the scope of this FEIS. 40 C.F.R. §1508.25(c) and 1508.8(b). EPA raised a legitimate concern that development of the Village at Wolf Creek could adversely impact the small streams directly within the project site. The SRM may not adequately characterize the stream flow during non-snow melt conditions. Moreover, the SRM does not provide information on baseline water quality conditions of these small streams. Under the NEPA regulations, the USFS's response to comments should, "Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response." 40 C.F.R. §1503.4(a)(5). USFS's response also fails to adequately explain why it failed to collect the requested information pursuant to 40 C.F.R. § 1502.22 which requires the agency to either collect the information or explain why it is technically impossible or cost prohibitive to collect the information.

g. Lack of mitigation measures

Aside from the above listed Objectors' comments, EPA and others provided extensive comments on the need for concrete, enforceable mitigation measures to minimize impacts to air, water, and climate resources. EPA DEIS comment letter at pp. 2, 3, 4, 6, 7. NEPA regulations require that the final decision, "State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where

applicable for any mitigation." 40 C.F.R. §1505.2(c). The FEIS/ROD fails to identify and propose to enforce any specific mitigation or monitoring requirements on air, water, and climate resources other than the general statement that "[t]he implementation of these best management practices will reduce the potential impacts associated with the selected alternative." Draft ROD at p. 4. These BMPs are limited to stormwater runoff from the access road, the Village Ditch Infiltration Gallery located on South Pass Creek, and a raw water pipeline corridor. Draft ROD at 3-4. The Draft ROD then fails to identify specific BMPs and instead assumes that other stormwater permits will address these issues. *Id.*

Finally, the Draft ROD states, "The Forest Service has no authority to regulate the degree or density of development on private land; therefore, the required monitoring associated with my decision will be restricted to monitoring the best management practices and encumbrances described above. The Forest Service will be responsible for monitoring to ensure that each of the required actions stated in this decision occur." Draft ROD at p. 4. But as discussed above, the mitigation measures are few and do not come close to addressing the range of impacts that could occur with Village development.

Likewise, the FEIS only appears to impose specific mitigation measures for soils impacts" (FEIS at Section 4.3.2) and "wetlands" (FEIS at Section 4.7.2, only describing possible mitigation that *could* be required in a Clean Water Act 404 permit but failing to mandate any mitigation), and future (but currently unknown) lynx conservation measures (Draft ROD at p. 5, FEIS Appendix B).

The FEIS and Draft ROD ignore the fact that the property to be transferred is currently federal property that can be made subject to easements and conditions to mitigate adverse effects and require monitoring.

15. Water Supply for Either Action Alternative May Not be Sufficient or Reliable

Objectors raised this issue on page 29 of their DEIS Comments. The existing water supply to the Wolf Creek Pass area is almost certainly inadequate to meet the needs of full build out for the Village at Wolf Creek, and in dryer years, it would struggle to meet moderate density development. However, the issue of how and where additional water supply would be stored on the project site is not fully addressed in the FEIS, other than to mention that an on-site Reclamation/Village pond or reservoir is now proposed to be replaced by a series of storage

tanks.[26] Despite storage being a crucial issue to the water supply augmentation plan for the Village, it is not fully analyzed or addressed in the FEIS. A host of potential impacts flowing from the type and location of any water storage facilities remain inadequately analyzed.

The Water Rights and Use Sections (3.4.11-3.4.4) Pages 3-24 to 3-32 is unnecessarily complicated for public review and most readers would likely have to consult with an expert in water law to fully comprehend the ramifications of the proponents water rights, how it relates to the augmentation plan, its conditional uses and most importantly, how many EQR's (Equivalent Residential Units) are actually available for development. The accompanying tables, starting with the Colorado Water Conservation Board (CWCB) instream flow adjudicated water rights, to the tables displaying the EQR's, Diversions and Consumptive uses, Occupancy Rates (accompanied by an occupancy formula for reviewers to complete themselves), and water rights, fails to provide any substantive analysis of how these variables will work jointly and administratively (in priority), to provide adequate water supply.

Starting with 3.1.3.1, Watershed Hydrology, an oxygen and tritium sampling analysis is cited, performed by Mark Williams at the University of Colorado, Boulder 2006. In this analysis "groundwater was found to be the predominant water source in all surface water bodies at that time." (Williams, 2007). It goes on to say that "it is therefore likely that the summertime stream base flow can be attributed to groundwater recharging the stream." If this is indeed the case, then why isn't there analysis to determine how depletions to North and South Pass Creek and their tributaries (because this water will now be in storage tanks) will impact groundwater depletions? If there is an impact to groundwater, how will that influence nearby wetlands?

It appears from the Geology (3.2.2), Groundwater (3.2.3) and Hydraulic Conductivity tests (3.2.4) that the accumulated snowpack is absorbed into groundwater and eventually connects downstream to supply the Rio Grande to enhance late season flow. The Proponent is proposing to collect and store its water supply during the Spring season, a competitive time of year for water users, resulting in management difficulty to meet downstream obligations later in the summer. The FEIS presents tables of figures, but does not analyze how this splayed Augmentation Plan will be administered to meet senior water right obligations.

Mineral County does not possess the Federal Emergency Management Agency (FEMA) Flood Insurance Rate map for North and South Pass Creeks, illustrating that flood plains have not been mapped for this project area. FEIS p. 3-14. The FEIS failed to analyze the possibility of or impacts from flooding. Potential unanalyzed impacts could include wastewater runoff, damage

[26] FEIS p. A-6 states that an additional 3.5 acres would be needed for water storage for the maximum density development under alternative 2.

to infrastructure, need for backup power generation, and other reasonably foreseeable impacts.

a. Rio Grande River Administration

The Proponents portfolio of direct, flow, storage, and exchanged water rights were all decreed in case No. 87CW7, Water Division 3. This decree provided the original proponents with a legal water supply capable of supporting the various development concepts as contemplated back in 1987. FEIS 3-25. If this is indeed the case, and the Forest Service Record of Decision in 1986 was contemplating 207 units, the use of this information in the FEIS to analyze a maximum build out scenario of 1,711 units and stating that water rights would be sufficient to meet the needs of this large development is arbitrary and capricious. *See* FEIS at 4-51.

b. Pass Creek

There exist a number of water rights that divert water from Pass Creek and its tributaries, including a Colorado Water Conservation Board (CWCB) instream flow water right. FEIS 3-27. Observations of streamflow measurements on the North Branch of Pass Creek indicate that the streamflow often drops below CWCB minimum seasonal levels. FEIS at 3-27. This observation suggests that the likelihood of the CWCB placing an administrative call on the North Branch of Pass Creek is high. The likelihood of the CWCB placing an administrative call on Pass Creek during the summer and winter season is also high. The FEIS goes on to suggest that the water availability model that analyzes alternatives then needs to demonstrate and take into account the potential for a reduced summer and winter supply and/or demonstrate the ability to provide sufficient augmentation. While reviewing the FEIS section 3.4.4, the Decree Plan for Augmentation, these CWCB minimum stream flow water rights were either not included or not made apparent in the Decree Plan.

c. Decrees for Augmentation

The FEIS states that "the Decree total is less than the water required to meet the demand of 1,748 (Equivalent Residential Units) EQR's, 100% of the time." FEIS at 3-30. A monthly occupancy rate table is provided, assuming a low of 20% during shoulder months of May and October and a high of 85% during winter season between December and March. Table 3.4-3, p. 3-31. The "Conditional" water supply available on-site, for residents is 121 acre ft., with 31.5 acre ft. available for replacement. It is understood that the exchange total available from the Rio Grande Reservoir, located in a distant drainage is 152.5 acre feet, but this Decree Plan (on-site and exchange) is almost completely based on Conditional type junior water rights, with the exception being a trans-basin diversion for Replacement Water Rights, typed Absolute at 18 cfs.

In short, this Decree Plan is an administrative nightmare to implement in an already over-appropriated basin. An analysis needs to be completed that models relevant scenarios using the Rio Grande Decision Support System (RGDSS) and Colorado Water Division 3 data management tools to determine an accurate maximum EQR. The Decree Plan Decision of 1987 does not even begin to contemplate the impacts of Climate Change and how that may reduce water supply for the entire Rio Grande Basin, impacting Rio Grande Compact obligations and the reduction of stream flow for riparian habitats.

16. In Violation of NEPA, the FEIS Fails to Analyze the Feasibility of, and the Possible Impacts From a Grade Separated Interchange at the Village Access Road with Highway 160

Objectors raised this issue on page 29 of their DEIS Comments. Under the Council on Environmental Quality Regulations implementing the National Environmental Policy Act, agencies must analyze cumulative impacts, including those from connected actions:

> "Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 CFR 1508.7

> To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:
>
> (a) Actions (other than unconnected single actions) which may be:
>
> 1. Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:
>
> (i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

2. Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

3. Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include:

1. No action alternative.
2. Other reasonable courses of actions.
3.Mitigation measures (not in the proposed action)

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.

40 CFR 1508.25.

a. Impacts from a Grade Separated Interchange Must Be Analyzed and Disclosed in the FEIS for the Proposed Land Exchange

The 2011 Feasibility Analysis for the Village at Wolf Creek Land Exchange Proposal described the proposed land exchange and made a public interest determination. One of the" merits", i. e., a reason that the Forest Service believed the land exchange might be in the public interest, was as follows:

A grade separated interchange off Highway 160 <u>will be built</u> for access that will accommodate traffic volumes at full buildout, and so will not need to be

> revised/revisited for future phases. This location and design will be agreed to by the proponent, CDOT and the USFS (including [Wolf Creek Ski Area] as FS permittee) prior to the completion of the exchange analysis.

Feasibility Analysis at 14 (emphasis added).

In its comment letter on the DEIS dated October 11, 2012, The Colorado Department of Transportation (CDOT) stated:

> CDOT contends that this document should disclose the feasibility and effects from the maximum development density of the Village in order for this document to satisfy The Federal Highway Administration's (FHWA) National Environmental Policy Act requirements for the proposed action. An incomplete analysis of the maximum development scenario results in a segmentation of the NEPA analysis, as it does not disclose whether a grade separated interchange is economically or technically feasible, or the significance of the environmental consequences from such an action.

CDOT letter at 1.

In its Response to Comments (FEIS Appendix I), the Forest Service answers this concern in part of a response to a related comment by Rocky Mountain Wild as follows:

> Should [] a threshold [for a grade-separated interchange] be reached at some point in the future, LMJV would need to make a project proposal to the Forest Service and CDOT, and if it were to be accepted, a site-specific NEPA analysis would need to be prepared to analyze the direct, indirect, and cumulative impacts of a grade-separated interchange.
>
> Regardless, if a grade-separated interchange were to be necessary, it is likely that it would be in the distant future. Whether or not a grade-separated interchange is economically or technically feasible, or necessary, is beyond the scope of this analysis, as the purpose of the FEIS is to analyze access alternatives to the private land inholding.

II FEIS at 155.

This response is wrong. There is a good chance that if the Forest Service approves the land exchange, a maximum level of development of the Village could occur, with greatly increased traffic levels[27] necessitating a grade separation at Highway 160. With full build-out under the maximum development concept, traffic would approach capacity of the highway on peak days during the ski season. FEIS at 4-192. Some of these peak days will undoubtedly overlap with less than ideal driving conditions in an area that averages 400 inches of snow annually. It is highly likely that a grade-separated interchange would be needed to handle the greatly increase traffic and to ensure highway safety.

The need for this interchange is thus a "reasonably foreseeable future action" and an action connected to construction of the Village, which would be made possible by approval of the land exchange.[28] Thus now is the time to determine if such an interchange is economically and technically feasible, because there is a reasonably foreseeable need for this facility. If it isn't feasible for any reason(s), or maybe even if it is feasible, the Village might not be constructed to a full build-out, as the FEIS states:

> …the potential need for a grade-separated interchange effectively would become a limiting factor for private land development beyond the Moderate Density Development.

II FEIS at 155.

In any case, the feasibility of, and the potential impacts from, a grade-separated interchange is something the proponent, the agency, and the public need and deserve to know at this stage.

A grade separated interchange would likely involve a major structure, similar to an interchange on an interstate highway. Such a facility could have considerable impact, especially on the scenic quality of the surrounding area and on the ability of lynx to cross the highway in a very important linkage. (See section 12 above). And since construction of this type of interchange is reasonably foreseeable, the impacts must be analyzed and disclosed in the FEIS for the land exchange.

Doing NEPA later, as the agency proposes (see quote above from II FEIS at 155), would violate another section of the CEQ Regulations, which state:

[27] Annual average daily traffic on Highway 160 over Wolf Creek Pass in 2010 was 3200 vehicles per day. I FEIS at 190. Under maximum development with alternative 2, the traffic is expected to rise to 8350 vehicles per "typical" (not peak) day. Id. at 4-189.

[28] The FEIS states that a grade-separated interchange may be necessary. See, e. g., I FEIS at 2-8 and II FEIS at 70.

> Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

40 CFR 1508.27(b)(7). This possible segmentation of analysis of highway access components was even highlighted by the CDOT in its comments on the DEIS, quoted above.

Just because the need for a grade-separated interchange is supposedly in the "distant" future does not relieve the Forest Service of its responsibility to analyze its impacts in the analysis for an earlier action (the land exchange and concomitant Village development) that would likely cause the need for the new interchange. Throughout the FEIS, the agency analyzes potential impacts from full build-out of the Village at Wolf Creek under the maximum density concept, even though that is presumably in the "distant" future also. There is no reason it should not analyze the impacts, including the technical and economic feasibility, of a grade-separated interchange with the Village access road and Highway 160. Indeed, the CEQ Regulations clearly require such an analysis.

The Forest Service must prepare a supplement to the FEIS and thoroughly analyze the technical and economic feasibility of, and the possible impacts from, construction of a grade-separated interchange at the junction of the Village access road with U. S. Highway 160. This supplement must be issued for public comment before finalization.

17. The FEIS fails to Analyze the Impacts of Relinquishing Federal Control via the Scenic Easement

Objectors raised this issue on page 2 of our DEIS comments.

The federal Scenic Easement that encumbers the LMJV parcel has several important features and "prohibits 19 different land uses; prohibits mobile homes, mining and states conditions for advertising signs; specifies that architectural style of all structures be compatible with the location, that building materials be harmoniously colored, and that building heights be no greater than 48 feet." FEIS at 8. More importantly, the terms of the Scenic Easement confirm that the LMJV development is subject to considerable federal control:

> WHEREAS, the Grantors through the Forest Service, in accordance with the Act of
> October 10, 1978 (92 Stat. 1065), desire **to administer the herein described lands to protect the scenic and recreational values of**

adjoining National Forest System lands; to provide a specific level of control of the type of development on said land to assure that said development is compatible with the WolfCreek Ski Area, and
[….]
3 APPROVAL OF DEVELOPMENT PLANS BY GRANTEE
a. **Prior to commencement of construction on the real property which is subject to this easement, the Grantors shall submit I) a copy of their development plans, 2) architectural styling plans as set forth in 2.b.(i) above to the Forest Supervisor, Rio Grande National Forest, for approval.** Within thirty (30) days following receipt of such plans, the Forest Supervisor shall provide to the Grantors in writing all reasonable objections which the Grantee has to such plans on the grounds of non-compliance with the terms of this easement. The failure of the Forest Supervisor to deliver to Grantors such written objections within 30 days from receipt of the development plans shall conclusively establish the acceptance of such plans by the Grantee and the waiver of any inconsistent provisions of this easement. All written objections which are provided within this 30-day period shall be the subject of negotiations between Grantors and Grantee for an additional 30-day period. In the event that the parties are unable to resolve their differences within this 30-day period, the Grantors may amend or withdraw all or part of their development plans. **The remaining unresolved written objections of the Forest Supervisor shall be deemed to be fmal agency action without right of appeal or request for administrative review by the Grantors**, subject to the provisions of the following paragraph 3.b.
[…]
c. The Forest Supervisor, Rio Grande National Forest, may, at his discretion, waive
in writing any provision of this easement. **The Forest Supervisor, Rio Grande National Forest, may terminate any provision or all provisions of this easement when such termination is determined to be in the public interest.** Such waiver or termination shall not be subject to any provision of law regarding abandonment of property of the United States.

FEIS App. F. There is no evaluation in the appraisal or FEIS of the value of this federal interest in the LMJV development proposal or the differential value of the unencumbered property LMJV would receive in the land exchange.

Without any NEPA analysis or mention of the beneficial public interest in maintaining federal control over the LMJV development to protect the National Forest and WCSA, the

FEIS reveals that the land exchange would effectively terminate the Scenic Easement.

> Under Alternative 2, ±177.8 acres of private lands in this inholding would be exchanged with the Rio Grande NF for ±204.4 acres of NFS lands, resulting in a private parcel of ±323.9 acres. The ±119.5 acres of the existing private inholding that remain in private ownership would still be subject to the Scenic Easement requirements, **however, the ±204.4 acres of Federal land proposed to be exchanged with the Proponent would not be subject to the provisions of the Scenic Easemen**t.

FEIS at 2-7. Under Alternative 3, the Scenic Easement would continue to encumber the LMJV development proposal, but there is no comparison of the revocation in the land exchange with the extant Scenic Easement that would remain in the ANILCA access alternative. Id.

As discussed above in the Section 1 objection to the unlawfully narrow federal action and purpose and need, the March 6, 1986 Decision Notice that carved the private parcel out of National Forest System was premised on federal control over any development of the LMJV parcel:

> It is my decision to proceed with Alternative 1, the land for land exchange, subject to the following conditions:
> …
> 4. The land exchange proponent must donate an easement over the Federal tract to the United States which **provides a specific level of control of the type of developments** on the Federal land conveyed. The purpose of the easement will be to **assure that development of the Federal land conveyed is compatible with the Wolf Creek Ski Area**.

Exh. 1 (19860306DN -March 6, 1986 Decision Notice allowing land exchange) The inclusion of federal control was purportedly one of the factors that altered the initial Forest Service decision to choose the no action alternative because the public [b]enefits are not clear in the proposed land exchange. " Exh. 11 (19860220DN) (February 20, 1986 Decision notice rejecting land exchange proposal).

The Rio Grande National Forest is beginning its Management Plan revision for the next 20 years. Part of the Plan revision will require a Continental Divide National Scenic Trail Unit Plan. This is significant because Visual Resource Impact is a major consideration of this unit plan.

The Scenic Easement needs to be enforced to ensure that visual resources are protected. There was no analysis done in the FEIS regarding visual impacts to the Continental Divide National Scenic Trail.

Now, and without explanation, the proposed action would relinquish federal interests in the Scenic Easement, which provides a main source of federal control over the LMJV development proposal. Draft ROD at 8. NEPA prevents agencies from taking such uninformed action. Moreover, based on the incomplete record and history of the LMJV project, Objectors reserve the right to later supplement our objection concerning the proposed relinquishment of a valuable federal interest in the LMJV development proposal via a land exchange without NEPA analysis of the impacts and valuation of this federal property interest.

Without prior compliance with NEPA and other federal laws, the Forest Service cannot lawfully relinquish the Scenic Easement.

18. Failure to Reinitiate Consultation for the Yellow Billed Cuckoo Pursuant to Section 7 of the Endangered Species Act

NEPA requires that the USFS fully disclose the Project's impacts on all affected threatened and endangered species and their designated critical habitats. See 40 C.F.R. § 1508.27(b)(9). Impacts to threatened or endangered species short of "jeopardy" or the "destruction or adverse modification of critical habitat" (the standard used under Section 7 of the ESA, 16 U.S.C. § 1536(a)(2)) may still be significant and must be examined under NEPA. At present, the USFS has not yet engaged in the ESA Section 7 consultation process with the U. S. Fish and Wildlife Service for the yellow-billed cuckoo.

Before the FS makes any "irreversible or irretrievable commitment of resources" that may have an impact on a listed species, ESA § 7 requires it to comply with consultation requirements. BLM is required to prepare a biological assessment (BA) to determine whether the listed species is "likely to be affected" by the proposed action. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. If the species will be affected, then BLM must engage in formal consultation with FWS to determine whether the activity "is likely to jeopardize the continued existence of" the species or "result in the destruction or adverse modification of" its critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14; *see also* 50 C.F.R. §402.02 (defining "jeopardy" as lessening the likelihood of survival and recovery of a species). At the conclusion of consultation, the FWS must prepare a "biological opinion" (BO) to evaluate the potential effects of the proposed action on the species or its critical habitat. If the Service concludes that the action will have a negative effect, it must suggest "reasonably and prudent alternatives" (RPAs) that will not

cause jeopardy. Otherwise, the Service issues a "no jeopardy" opinion. 16 U.S.C. § 1535(b)(4). The Tenth Circuit stated that "despite its name, consultation is more than a mere procedural requirement, as it allows FWS to impose substantive constraints on the other agency's action if necessary to limit the impact upon an endangered species." *N.M. ex rel. Richardson v. BLM*, 565 F.3d 683 (10th Cir. 2009).

Federal agency actions within or affecting the species' habitat that may require conference or consultation or both as described in the preceding paragraph include, but are not limited to, projects that will result in removal or degradation of riparian vegetation, altered streamflow or fluvial dynamics[29], or other habitat-altering activities on Federal lands or as a result of issuance of section 404 CWA permits by the USACE; construction and management of energy and power line rights-of-way by the FERC; construction and maintenance of roads, highways, or bridges by the Federal Highway Administration; grazing leases by the USFS or the BLM; and projects funded through Federal loan programs. Such projects may include, but are not limited to, construction or modification of reservoirs, levees, bank stabilization structures, water diversion and withdrawal projects, roads and bridges, utilities, recreation sites, and other forms of development, and livestock grazing.

One of the reasons for listing the yellow billed cuckoo is the loss of habitat, some of which has been caused by reduced water flow. Lower or otherwise altered flows (like via dams) make it more difficult for the riparian vegetation structure needed by the species to develop. Colorado Parks and Wildlife points out that "[t]he development is at the headwaters of the South Fork drainage, therefore, any adverse effects could be felt throughout the entire drainage." *CPW DEIS Comments.*

In light of the above, the question then becomes when and how much flow can be removed from North and South Pass Creeks under each of the potential development concepts and still maintain stream flows that will not impact the cuckoo? Analysis to answer this question typically requires fairly extensive stream flow and sediment transport data collection, which the FS has declared is outside the scope of this FEIS. FEIS 4-5.

19. Bias and Proponent Control of the Third Party NEPA Contractor was Built into the Contract.

[29] The listing rule for this species states that habitat loss is primarily from riparian habitat destruction and loss, which is caused in part by reduced stream flows. See 79 Fed Reg 60015, October 3, 2014.

Despite an MOU limiting the Proponent's participation (see Exh. 20 - 78763_FSPLT3_2392675), basic NEPA decisions such as invitation of cooperative agencies were presented to Adam Poe for review and approval. Exh. 21 - 78763_FSPLT3_2392679. Although communications between the proponent and the contractor were to be limited to milestone updates, a contract was executed by which the proponent could track and oversee the contractor's activities.

> WER will provide WLG consolidated monthly invoices for such work no later than the last day of the month. WLG will immediately review such invoices and provide copies to the Proponent.

Exh. 16 (78763_FSPLT3_2392464). Although the Administrative Record lacks the full range of communications, documents released in the previous NEPA revealed that billing is a favored method for the proponent to monitor and influence the NEPA analysis. Contacts with Poe were extensive. Exh. 30 (78763_FSPLT3_2392685).

Even the incomplete AR reveals that Adam Poe and other agents were influencing the Forest Service and the NEPA contractor throughout the process. For example, when alternatives were being chosen, Forest Service personnel were conveying the proponent's threats via forwarded emails saying, for example, that "Poe tells me that Red McCombs will pull the proposal and set the access application back in front of you." Exh. 31 (78763_FSPLT3_2392571). Influence on choice of alternatives was forbidden by the MOU. Exh. 20 (78763_FSPLT3_2392675). Further evidence of improper participation by the project proponent can be found in emails about utility issues from David Johnson of Western Ecological Resources to Forest Service employee Adam Mendonca conveying that "[t]his information should be provided to Western Land Group for review by the Proponent." Exh. 32 (*FW_ Village at Wolf Creek Draft FEIS_b).*

Adam Poe even kept the Forest Service updated on changes to project opponent's website, which Tom Malecek forwarded to other NEPA team members. Exh. 33 (78763_FSPLT3_2392649). Adam Poe was kind enough to forward other emails concerning wildlife that Mr. McComb's agent received from his subscription to Colorado Wild messaging service. Exh. 34 (78763_FSPLT3_2393149). When LMJV ran into resistance, it sought out meetings with the Undersecretary. Exh. 25 (WIP RGNF – 8/14/2012 Briefing Paper) at 9 ("The proponent plans to discuss the issue with Undersecretary Sherman prior to that meeting.").

20. Failure to Consider New Information

The FEIS fails to address the significant new information now available on yellow billed cuckoo, water supply, Canada lynx, boreal owl, Continental Divide National Scenic Trail Unit Plan, and

other new and relevant information mentioned in other sections of this Objection. An "agency must be alert to new information that may alter the results of its original environmental analysis, and continue to take a 'hard look at the environmental effect of [its] planned action, even after a proposal has received initial approval.'" *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557 (9th Cir. 2000) (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989)).

In order to satisfy the "hard look" requirement, the BLM must supplement its existing environmental analyses when new circumstances "raise significant new information relevant to environmental concerns . . . ." *Portland Audubon Soc'y v. Babbitt*, 998 F.2d 705, 708 (9th Cir. 2000). Agencies are required to "prepare supplements to either draft or final environmental impacts statements if . . . there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii) (2009). The Supreme Court has held that a supplemental EIS must be prepared if "new information is sufficient to show that the remaining action will 'affect the quality of the human environment' in a significant manner or to a significant extent not already considered . . . ." *Marsh v. Or. Natural Res. Council*, 490 U.S. 390, 374 (1989); *see* 42 U.S.C. § 4332(2)(C) (2009). In a recent Utah case, the court held that the "Utah BLM ignored significant new information when it decided to lease [for oil and gas] the sixteen parcels at issue without first conducting a supplemental NEPA analysis." *So. Utah Wilderness Alliance v. Norton*, 457 F. Supp. 2d 1253, 1267 (D. Utah 2006).

21. Failure to Consider the Best Available Science

The FEIS fails to consider the best available science. When analyzing the impacts to Boreal Owl the FEIS provides that:

> Boreal owl surveys were conducted in the vicinity of the project site in 2004 and 2005 (Thompson, 2005). No boreal owls were detected in 2004; in 2005 a single male and a male/female pair within an active nest territory were detected within the Federal parcel. In 2009, surveys were completed on both the Federal and private land parcels; no boreal owls were detected (WER, 2010e,f). *FEIS 3-82.*

This information is contrary to the information contained in an email to Forest Service Wildlife Program manager Randy Ghormley dated March 19, 2010 from Rick Thompson, Wildlife Biologist for Western Ecosystems, a listed project consultant that conveyed,

> I conducted the first of three boreal owl survey reps. on Wolf Creek on March 15 and 16 under perfect conditions. I detected three separate owls, one in Silver Creek on the east side of the SUP area, one above Wolf Creek Pass meadows on the west side of the SUP area, and one on the private parcel. So we have occupied habitat in both of the two habitat blocks associated with the proposed ski area upgrading. *FW_ Recommended BOOW Survey protocol*

The failure to incorporate the results from the most recent boreal owl survey is a failure to base this NEPA analysis on the best available science.

22. Failure to adhere to NEPA's public involvement mandates

NEPA requires that agencies "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures." 40 C.F.R. §1506.6(a). Instead, the Forest Service has acted in numerous ways that have interfered with the public's ability to understand and participate in this NEPA process. As a practical matter, the release of the decision on November 21, 2014 and refusing to extend the January 5, 2015 objection deadline appears to be part of an ongoing pattern and practice of denying public scrutiny of the LMJV proposal by violating federal records laws. *Colorado Wild, Inc. v. Peter Clark*, 05-cv-01173-JLK-DW, Dkt 11, 15 (Orders setting dates for release of supporting agency documents.) Id. at Dkt 62-2 (Joint Stipulation and Settlement Agreement settling case after disclosure of withheld agency records concerning the Village at Wolf Creek that were ghost written by non-agency personnel listed in the settlement agreement). *Colo. Wild, Inc. v. U.S. Forest Serv*., 2007 WL 3256662, at *1, *4 (D. Colo. Nov. 1, 2007)(finding agency record not entitled to presumption of regularity).

As a matter of law, FOIA and NEPA are interrelated, and contemplate that records will be made available through FOIA to allow full public involvement in the Forest Service NEPA process. Agencies must:

Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action.

40 C.F.R. §1506.6(f) "[A]n untimely response is a violation of FOIA, regardless of the final outcome of the request." *Or. Natural Desert Ass'n v. Gutierrez*, 409 F. Supp. 2d 1237, 1248 (D. Or. 2006). "FOIA timeline violations and found that denial of timely access to agency records

"was itself an injury – an invasion of a legally protected interest." Gilmore v. United States DOE, 33 F. Supp. 2d 1184, 1189 (N.D. Cal. 1998). Violations of Freedom of Information Act deadlines and NEPA's public involvement mandate, as a practical, have impacted Objectors' rights and abilities to fully participate in the Forest Service decision making process.

The following Forest Service actions, individually and cumulatively, have violated Objectors' FIOA and NEPA rights. As a result, the FEIS and any subsequent decision taken constitutes arbitrary and capricious agency action, an abuse of discretion, and action without observance of procedures required by law, pursuant to the APA. 5 U.S.C. § 706(2).

a. FOIA Violations

There are two Wolf Creek FOIA requests pending before the Forest Service. Rocky Mountain Wild sent a FOIA request on February 27, 2014 and is currently in the U.S. District Court in Colorado challenging the agency's failure to respond to a timely filed administrative appeal of withheld documents. *RMW v. Forest Service,* 14-cv-02496-WYD-KMT (D. Colo 2014). Rocky Mountain Wild sent a second FOIA request on November 20, 2014, requesting the Administrative Record and related communications for this decision. *See Exh. 35. (RMW November 20, 2014 FOIA Request).* The Forest Service acknowledged receipt of this request in a letter dated December 3, 2014. *Exh. 36 (FOIA acknowledgement).* A response to the November 2014 FOIA request was due on December 19, 2014. As of today, no responsive documents have been received. Review of the documents requested in these FOIA requests is essential to informed public involvement and adequately objecting to this decision. Forest Service regulations require that, aside from "[d]ocuments referenced by the Forest Service in the proposed project…EIS", "[a]ll other documents must be included with the objection." *36 CFR §218.8(b)*. Withholding documents will impair objectors ability to adequately participate in this decision making process. Enforcing a deadline for objectors while the Forest Service is in violation of numerous statutory deadlines is arbitrary and capricious.

b. Scheme to Illegally Withhold Documents

In an email exchange on January 9, 2013, regarding applicability of the Southern Rockies Lynx Amendment, Randy Ghormley stated "I had Rick send that to me hardcopy so it would not be subject to FOIA (is that correct?)." He then continued, "I'll have Rick send it electronically through an email with Ken as a cc so it will remain attorney-client privilege and not subject to FOIA from what I understand." Attorney Ken Capps responds, "It is subject to FOIA right now but we'd deny any request for it under the deliberative process privilege…" This exchange

shows a deliberate and calculated scheme to illegally withhold important documents from the public. Exh. 14 (*FW_ WCV FP Amendment Question Revisited).*

c. Public Hardship due to Holidays

Our organizations face the same constraints as were represented to the Colorado District Court on December 10, 2014, by Zeyen Wu, the Department of Justice Attorney representing the Forest Service in related Wolf Creek Freedom of Information Act (FOIA) litigation. When discussing the timing of the release of a Vaughn index for withheld Wolf Creek documents, he stated:

> I conferred with the agency folks I'm working with this morning -- four or five of them – at least two or three will be gone for at least parts of that week. And then President Obama, as you know, has given us the Friday after, so that's a three-day week to begin with. The week after that, the week of December 29th, I'm on vacation, previously scheduled.

Exh. 37 (December 10, 2014 Court transcript, p. 7-8). This acknowledgement that many people do not work over the holidays does not take into account that the Forest Service released its decision the week before Thanksgiving knowing it would burden the public with a deadline involving multiple holidays. Especially, considering that many children have school vacations for a week during Thanksgiving and two weeks over Christmas and New Year's. Our organizations have been anticipating this decision for close to a year, and to time the release and objection period during three major holidays greatly impacts our opportunity to thoroughly review and comprehensively draft an objection to this decision.

d. EPA Comment Deadline

Objectors also take issue with the objection period's simultaneous deadline with the Environmental Protection Agency's Clean Air Act 309 comment deadline. The EPA's Clean Air Act 309 comments are also due on January 5, 2014. Review of the EPA's comments would help objectors to fully understand the impacts of this decision.

e. Objectors' Extension Request

On December 23, 2014, Objectors requested a 45 day extension to the Objection Period for the above listed reasons. The Forest Service failed to respond, which Objectors consider a denial of

their request. The unwillingness of the Forest Service to adhere to NEPAs public involvement mandates is arbitrary, capricious, and against the law.

23. Suggested Remedies

The proper remedy in cases with NEPA violations is to invalidate the NEPA analysis and any action taken, along with a remand for further proceedings. Wyoming Outdoor Council v. U.S. Army Corps of Eng'rs, 351 F. Supp. 2d 1232, 1238 (D. Wyo. 2005). Invalidation of the NEPA analysis and any other action taken in reliance on the invalid NEPA analysis is appropriate where "NEPA procedures must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b).

The deficient FEIS requires a new NEPA process that is not contaminated by the violations addressed herein. On the facts of the present case, particularly the unlawfully narrowed scope of analysis and the complete failure to review mitigation measures and their effectiveness, invalidation of the FEIS should be accompanied by remand directing the issuance of a Notice of Intent to begin the NEPA process anew with the preferred alternative being development of homesites on 35 acre parcels under existing access subject to existing federal encumbrances of the LMJV parcel. 40 C.F.R. § 1500.1(b).

Objectors recommend the following measures to address the issues in our objection:

1. The reviewing officer must invalidate the FEIS, appraisals, and analysis conducted in the NEPA process. He must confirm that a ROD cannot be issued at this time.

2. Remand the analysis to the Responsible Official and/or other appropriate personnel. He must require, at a minimum, an adequate analysis of all issues raised in this objection, including the following:

a. The Forest Service must not approve any land exchange that would reduce lynx habitat connectivity and/or violate any provisions of the SRLA.

b. Before approving any land exchange, the agency must: 1) demonstrate that any action, including connected actions and cumulative effects of all actions, will not result in additional take of lynx, or degrade the functioning of the WCPLL. 2) State with some particularity what mitigation measures would be implemented, and show that they would be

effective in minimizing take and fully maintaining the functioning of the WCPLL. 3) Avoid the loss of lynx habitat within the WCPLL.

c. Adhere to NEPA's mandates, including: analyzing a full range of alternatives, considering a true no action alternative, and accepting as cooperating agencies those agencies with legal jurisdiction and/or special expertise.

d. Comply with the legal requirements of FOIA by providing all requested documents, or demonstrating why disclosure can legally be denied for certain documents.

e. Ensure Forest Service will not conspire to hide any documents relevant to the project from the public

f. Acknowledge that ANILCA does not require that the Forest Service provide increased access and modify NEPA analysis accordingly.

g. Initiate Section 7 ESA consultation for the yellow billed cuckoo.

h. If any access is approved: impose terms and conditions, reserve rights, and retain interests as needed to conserve resources on national forest lands.

i. Insure that any decision on access to the LMJV property is truly in the public interest, after complete disclosure and analysis of the benefits versus the detriments.

j. Fully analyze the technical and economic feasibility of a grade-separated interchange at the junction of the access road to the proposed Village and Highway 160, and fully disclose the impacts of such a facility.

k. Analyze and disclose the full potential impacts to wetlands, especially fens, from the creation of impervious surfaces that would adversely affect groundwater recharge and from the disruption of groundwater flow due to the construction of buildings and other facilities. Disclose whether off-site mitigation for wetland functions lost is likely to be necessary.

l. Completely disclose all possible impacts to water quality from the proposed development of the Village. Do not permit any project, activity, or land exchange that could lead to a violation of water quality standards.

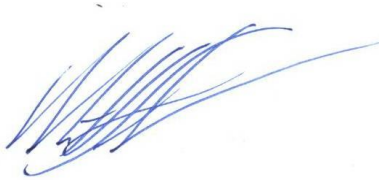
m. Demonstrate that the best available science has been used in analysis of impacts.

n. Adequately analyze the impacts of losing previously imposed scenic easements.

o. Conduct new appraisals which accurately consider the totality of the circumstances impacting the properties.

p. Analyze the potential impacts resulting from the type and location of any water storage facilities, a crucial component of the Water Supply Augmentation Plan. The Water supply plan needs to include analysis regarding impact to groundwater flow and how that will effect neighboring wetlands and late season flow in the Rio Grande; quantify actual water rights on site, including likely administrative calls; develop a realistic Equivalent Residential Unit EQR based on available water, as opposed to punting to an augmentation plan located in another drainage; and require the Proponent to do floodplain mapping for the area.

Submitted by:



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